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THE
HISTORY
OF THE
COMMON LAW;

BY
SIR MATTHEW HALE.

THE FIFTH EDITION,
(WITH CONSIDERABLE ADDITIONS)

ILLUSTRATED WITH
NOTES AND REFERENCES,
AND
SOME ACCOUNT OF THE LIFE OF THE AUTHOR.

By CHARLES RUNNINGTON,
SERJEANT AT LAW.

Of Law no less can be acknowledged, than that her seat is the
bosom of God; her voice the harmony of the world; all things
in heaven and earth do her homage; the very least, as feeling her
care, and the greatest, as not exempted from her power.

HOOKE.

VOL. II.

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CHAPTER I

THE CONSTITUTION

THE CONSTITUTION is the body of laws and principles which regulate the government of a state. It is the foundation of the political system, and the source of the authority of the government. The constitution is the law of laws, and it is the duty of every citizen to know and understand it.

CHAPTER II

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THE
HISTORY
OF THE
COMMON LAW
OF
ENGLAND.

CHAP. IX.

Concerning the settling of the common law of England in Ireland and Wales : and some observations touching the isles of Man, Jersey, and Guernsey, &c.

THE kingdom (a) of Ireland being conquered by Henry II. about the year 1171 (b), he, in his great council at Oxon, constituted his younger son, John, KING thereof;

(a) It was only entitled the dominion, or lordship, of Ireland, (stat. Hiberniæ 14 Hen. III.) and the king's stile was no other than *dominus Hiberniæ*, lord of Ireland, till the thirty-third year of Henry VIII. when he assumed the title of king, which is recognized by act of parliament, 35 Hen. VIII. cap.

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3.—Ireland is still a distinct though a dependant subordinate kingdom. As to the deduction and change of the king's title in respect to Ireland, see Seld. Tit. Hon. b. 1. c. 4. s. 2.

(b) Notwithstanding what hath been said by many historians of the total submission of Ireland to Henry II. sir John Davis very

B

pro-

thereof; who prosecuted that conquest so fully, that he introduced the English laws into that kingdom, and swore all the great men there to the observation of the same. Which laws were, after the decease of king John, again reinforced by the writ of king Henry III. reciting that of king John. Rot. Claus. 10 Hen. 3. memb. 8. & 10. Vide infra, & Pryn. 252, 253, &c.

AND because the laws of England were not so suddenly known there, writs from time to time issued from hence, containing divers *capitula legum Angliæ*, and commanding their observation in Ireland; as Rot. Parl. 11 Hen. 3. —the law concerning tenancy by curtesy, Rot. Claus. 20 Hen. 3. memb. 3. dorso—the law concerning the preference of the son born after marriage, to the son born of the same woman before marriage, or *bastard signe & mulier puisne*, Rot. Claus. 20 Hen. 3. memb. 4. in dorso: so the law concerning all the parceners inheriting without doing homage, and several transmissions of the like nature.

For though king Henry II. had done as much to introduce the English laws there, as the nature of the inhabitants, or the circumstances of the times, would permit; yet

properly observes, that this supposed conquest did not extend much further than the neighbourhood of Dublin.—With what propriety can that be called a conquest, where the conqueror cannot enforce his own regulations.—It was by very slow degrees only, that the Irish were civilised and brought to a state of submission. Barr. Obs. on Stat.

141. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the subjugation of it by Henry II.; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore. Pryn. on 4 Inst. 249.

partly

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partly for want of sheriffs, that kingdom being then not divided into counties, and partly by reason of the instability of the Irish, he could not fully effect his design. And therefore, king John, to supply those defects, as far as he was able, divided Leinster and Munster into the several counties of Dublin, Kildare, Meath, Uriel, Catherlogh, Kilkenny, Wexford, Waterford, Cork, Limerick, Tipperary, and Kerry; and appointed sheriffs and other officers to govern them, after the manner of England. He likewise caused an abstract of the English laws, under his great seal, to be transmitted thither, and deposited in the exchequer at Dublin. And soon after, in an Irish parliament, by general consent, and at the instance of the Irish, he ordained, that the English laws and customs should thenceforth be observed in Ireland; and in order to it he sent his judges thither, and erected courts of judicature at Dublin (c).

BUT notwithstanding these precautions of king John, yet for that the Brehon law (d), and other Irish customs, gave more

(c) Some have entertained an opinion that the laws of England were early introduced into Ireland by Henry II. long prior to the charter of John. Matt. Par. ad ann. 1172, vit. Hen. II.—Molyn. Case of Irel. 24.—War. Antiq. Irel.—Lel. Hist. Irel. 76.—Vaugh. 293.—4 Inst. 349. In the Harleian Collection of MSS. in the British Museum, is a very ancient transcript of two remarkable pieces of the old municipal laws of Ireland, with commentaries and glosses. The text in this manuscript is so very ancient, as to be coeval with the times the pieces relate to: the one being part of the *Bretanime*,

or *Judicia Cestria*, with the trial of Euna, brother to Legarius, chief king of Ireland, for the murder of Orane, chariot-driver to St. Patrick, before Dubhthac, the chief filodha, or king's bard; who on that occasion acted as sole brehon or judge, with the sentence passed thereon in the year 430: the other, the great sanction or constitution of *Nine*, made in favour of christianity in Ireland, anno 439, by three kings, three bishops, and three sages. Asley's pref. to the index to that collection.

(d) A law, or custom, by which the Irish were governed at the time of the conquest by Henry

more of power to the great men, and yet did not restrain the common people to so strict and regular a discipline as the laws of England did; therefore the very English themselves became corrupted by them; and the English laws soon became of little use or esteem, and were looked upon by the Irish and the degenerate English as a yoke of bondage: so that king Henry III. was oftentimes necessitated to revive them, and by several successive writs to enjoin the observation of them (e); and in the eleventh year of his reign he sent the following writ, viz.

“HENRICI rex, &c. Baronibus militibus & aliis liberis
“tenentibus Lageniæ, salutem, &c. Satis ut credimus vestra

Henry II.—so filed from the Irish name of judges, who were called brehons. Vide 4 Inst. 358.—Edm. Spenser's State of Ireland, p. 1513. edit. Hughes.

(e) Henry III. (A. R. 30. 1 Rym. Foed. 442) and Edward I. (A. R. 5. 3 Pryn. Rec. 1218.) were necessitated to renew the injunction of John; notwithstanding which, the Irish still adhered to the brehon law. At a subsequent period, however, i. e. 40 Edw. III. the brehon law was abolished, under the idea of its being “a lawd custom, crept in of later times.”—Spenser, speaking of this law, describes it to have been “a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great shew of equity, in determining the right between party and party; but in many things repugnant quite both to God's

law and man's.” Though this abolition of the brehon law was in form effected, by means of a statute made at Kilkenny, whilst the duke of Clarence was lord deputy, yet it is most certain, that the act was never carried into execution beyond the English pale; any more than another, made in the time of Henry VII. by which the use of the Irish language was forbidden, under certain penalties. The first statute, which thoroughly established the dependence of the Irish, was the famous law of sir Edward Poyninge, who was lord deputy of Ireland in the reign of Henry VII. Bar. on Stat. 143. So much of the Irish statutes of 40 Edw. III. as relates to the abolition of the brehon law, is in Dav. on Ireland, p. 28. of the folio edition. See also Harris's edition of Ware's Antiq. of Ireland, 69.

“audivit.

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“audivit discretio, quod cum bonæ memoriæ Johannes,
 “quondam rex Angliæ pater noster venit in Hiberniam,
 “ipse duxit secum viros discretos & legis peritos, quorum
 “communi consilio, & ad instantiam Hibernensium statuit
 “& præcepit leges Anglicanas teneri in Hibernia, ita quod
 “leges easdem in scriptis readactas reliquit sub sigillo suo ad
 “scaccar. Dublin. Cum igitur consuetudo & lex Angliæ
 “fuerit, quod si aliquis desponsaverit aliquam mulierem,
 “sive viduam sive aliam hæreditatem habentem, & ipse
 “postmodum ex ea prolem suscitaverit, cujus clamor au-
 “ditus fuerit infra quatuor parietes, idem vir si supervixerit
 “ipsam uxorem suam, habebit tota vita sua custodiam
 “hæreditatis uxoris suæ, licet ea forte habuerit hæredem
 “de primo viro suo qui fuerit plenæ ætatis: Vobis manda-
 “mus injungentes quatenus in loquela quæ est in curia
 “Willi. Com. Marefc. inter Mauritium Fitz Gerald
 “petent. & Galfridum de Marisco justiciarium nostrum
 “Hiberniæ tenentem, vel in alia loquela quæ fuerit in casu
 “prædicto nullo modo justitiam in contrar’ facere præsu-
 “matis.

“Teste Rege apud. Westm. 10 Decemb.

“Anno 11^o regni nostri (f).”

AND note, in the same year, another writ was sent to the lord justice, commanding him to aid the episcopal excommunications in Ireland with the secular arm, as in England was used.

ABOUT this time, Hubert de Burgo, the chief justice of England, and earl of Kent, was made earl of Connaught,

(f) Glan. l. 7. c. 18. p. 60. | 22. b. Calvin's case. Co. Lit.
 Rot. Claus. 11 Hen. III. 7 Co. | 141. b. Wright's Ten. 193.

and lord justice of Ireland during life; and because he could not personally attend, he on March the 10th 1227 appointed Richard de Burgo to be his deputy, or lord justice, to whom the king sent the following writ:

“ Rex dilecto & fideli suo Richardo de Burgo justiciario
 “ suo Hiberniæ salutem. Mandamus vobis firmiter præ-
 “ cipientes, quatenus certo die & loco faciatis venire coram
 “ vobis, archiepiscopos, episcopos, abbates, priores, comites
 “ & barones, milites & libere tenentes & ballivos singulo-
 “ rum comitatum, & coram eis publice legi faciatis
 “ chartam domini Johannis regis patris nostri cui sigillum
 “ suum appensum est, quam fieri fecit, & jurari a magna-
 “ tibus Hiberniæ de legibus & consuetudinibus Anglorum
 “ observandis in Hibernia; & præcipiatis eis ex parte nostra,
 “ quod leges illas & consuetudines in charta prædicta con-
 “ tentas de cetero firmiter teneant & observent. Et hoc
 “ idem per singulos comitatus Hiberniæ clamari faciatis,
 “ & teneri prohibentes firmiter ex parte nostra & forisfac-
 “ turam nostram, ne quis contra hoc mandatum nostrum
 “ venire præsumat. Eo excepto quod nec de morte nec
 “ de catallis Hibernensium occisorum nihil statuatur ex
 “ parte nostra citra quindecim dies a Sancti Michaelis anno
 “ regni nostri 12°. Super quo respectum dedimus magnat.
 “ nostri de Hib. usque ad Terminum prædict’ Teste meipso
 “ apud Westm. 8° die Maii, anno regni nostri 12°.”

AND about the 20th year of Henry III. several writs were sent into Ireland, especially directing several statutes which had been made in England to be put in use, and to be observed in Ireland; as the statute of Merton, in the case of bastardy, &c.

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BUT yet it seems, by the frequent grants that were made afterwards to particular native Irish men, *quod, legibus utantur Anglicanis*, that the native Irish had not the full privilege of the English laws, in relation at least to the liberties of English men, till about the third of Edward III. Vide Rot. Clauf. 2 E. 3. memb. 17.

As the common law of England was thus by king John and Henry III. introduced into Ireland, so in the tenth of Henry VII. ALL THE PRECEDENT STATUTES OF ENGLAND WERE THERE SETTLED BY THE PARLIAMENT OF IRELAND. 'Tis true, many ancient Irish customs continued in Ireland, and do continue there, even unto this day. But such as are contrary to the laws of England are disallowed. Vide Davis's Reports, 28. b. the Case of Taxistry [A].

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[A] Blackstone observes, that though the immemorial customs, or common law of England were made the rule of justice in Ireland, yet no acts of the English parliament, since the 12th of king John, extended into that kingdom, unless specially named, or included under general words; such as, "within any of the king's dominions." This is particularly expressed, and the reason given in the Year-Books (a): "A tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament;" and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send knights to our parliament: but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigny and Guienne, while they continued under the king's subjection." The general run of laws, enacted by the superior state, are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But when the sovereign legislative power sees it necessary to extend its care to any of

(a) 20 Hen. VI. 3. 2. Ric. III. 13.

As touching Wales, that was not always the feudal territory of the kingdom of England; but having been long governed

its subordinate dominions, and mentions them expressly by name, or includes them under general words, there can be no doubt but THEN they are bound by its laws (d).

Ireland, before the English conquest, though never governed by a despotic power, had no parliament. How far the English parliament itself was at that time modelled according to the present form, is a point much disputed by antiquarians. But we have all the reason in the world to be assured, that a form of parliament, such as England then enjoyed, she instantly communicated to Ireland; and we are equally sure that almost every successive improvement in constitutional liberty, as fast as it was made here, was transmitted thither. But this benefit of English laws and liberties, was not at first extended to all Ireland. English authority and English liberties had exactly the same boundaries. Sir John Davis shews, beyond a doubt, that the refusal of a general communication of these rights, was the true cause why Ireland was five hundred years in subduing. Nothing could make that country English, in civility and allegiance, but our laws and form of legislation. It was not English arms, but the English constitution, that conquered Ireland. From that time, Ireland has ever had a general parliament, as before she had a partial one (e).

Henry the Seventh, having sufficiently silenced all opposition in Ireland, took every politic advantage of the precarious situation to which the Irish were reduced; to prevent them, therefore, from passing laws *rege inconsulto*, and to make such an alteration in their legislature as would throw the principal weight into the hands of him and his successors, he was particularly anxious to effect the passing of those laws, which have ever since been known by the name of Poynings' law.

The original method of passing statutes in Ireland, was nearly the same as in England; the chief governor holding parliaments annually, or, as Blackstone conceives, at his pleasure, which enacted such laws as they thought proper (d). But an ill use being made of this liberty, a set of statutes was there enacted, in the 10 Henry VII. (Sir Edward Poynings being then lord deputy, whence they are called Poynings' law) one of which (e), in order to restrain the

(d) Year-book 1 Hen. VII. 3.

7 Rep. 22. Calvin's case. Black.

Com. 1 v. 101.

(e) Edm. Burke.

(d) Irish Stat. 11 Eliz. ft. 3.

c. 8.

(e) Cap. 4. expounds by 3

4 Ph. & M. c. 4.

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governed by a prince of their own, there were very many laws and customs used in Wales, utterly strange to the laws of

power as well of the deputy as of the Irish parliament, provides, first, that before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland, the considerations and causes thereof, and the articles of the acts proposed to be passed therein. Secondly, that after the king, in his council of England, shall have considered, approved, or altered the said acts, or any of them, and certified them back under the great seal of England, and shall have given licence to summon and hold a parliament, THEN the same shall be summoned and holden; and therein the said acts so certified, and no other, shall be proposed, received, or rejected (f). But as this precluded any laws from being proposed, but such as were pre-conceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means however there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering any law. It was now clear that neither the lords nor the commons in Ireland had a right to frame or to propose bills to the crown, but they must first be framed in the privy council of Ireland; be afterwards consented to, or altered by the king and council in England; and then, appearing in the form of bills, be refused or accepted *in toto* by the lords and commons of Ireland. Mr. Justice Blackstone says, that the usage at the time he wrote, was, that bills were often framed in either house, under the denomination "of heads for a bill or bills;" and in that shape were offered to the consideration of the lord-lieutenant and privy-council; who, upon such parliamentary intimation, or otherwise upon the application of private persons, received and transmitted such heads, or rejected them without any transmission to England; and with regard to Poyning's law in particular, it cannot be repealed or suspended, unless the bill for that purpose, before it be certified to England, be approved by both the houses (g).

It is true, that as well the lords as the commons in Ireland attempted, and should seem to have gained an approach towards their ancient right of beginning bills. This had been done not in that name, but under the nomination of "HEADS of bills," to be transmitted by the council; who, as they framed the acts, had

(f) 4 Inst. 353. (g) Irish Stat. 11. Eliz. ft. 3. c. 38.

of England; the principal whereof they attribute to their king Howell Dha (g).

AFTER

(g) There is a transcript of See Aile's pref. to the Index to them, in the Harleian collection that noble collection.
of MSS. in the British Museum.

assumed the power of modelling THOSE also. Thus restrained, Ireland exhibited a legislature of peculiar complication. First, the privy council of Ireland, who, though they might receive the hint from the lords or the commons, framed the bill; next, the king and council of England, who, having the power of alteration, really made it a bill, UNALTERABLE, by sending it under the great seal of England;—then, the two houses of lords and commons in Ireland must have agreed in, or rejected, the whole:—if it passed all these, it was presented to the king for his assent, which, as it was before obtained, could only, in that stage of the process, be nominal.

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law; and the measure of justice in both kingdoms becoming thereby no longer uniform, therefore it was enacted by another of Poynings' laws (b), that all acts of parliament, before made in England, should be of force within the realm of Ireland (c). But, by the same rule that no laws made in England, between king John's time and Poynings' law, were then binding in Ireland, it followed that no acts of the English parliament made since the 10th Henry VII. did bind the people of Ireland, unless specially named or included under general words (d). And on the other hand it was equally clear, that where Ireland was particularly named, or included under general words, they were bound by such acts of parliament. For that follows from the very nature and constitution of a dependent state; dependence being very little else, but an obligation to conform to the will or law of that superior person, or state, upon which the inferior depends (e).

But this state of independence not being acknowledged by the Irish nation, it was thought necessary to declare by statute (6 Geo. 1. c. 5.) that the kingdom of Ireland ought to be subor-

(b) Cap. 22.

(c) 4 Inst 351.

(d) 12 Rep 112.

(e) Puff. L. of N. 1. 8. c. 6. f.

24—and 1. 7. c. 7. f. 3, 4.—Orot.
1. 3. c. 8. and 15.

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AFTER king Edward I. had subdued Wales, and brought it immediately under his dominion, he first made a strict inquisition

dinate to, and dependent upon, the imperial crown of Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, had power to make laws to bind the people of Ireland.

Thus (continues Blackstone) we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the king's-bench in Ireland to the king's-bench in England (*m*), as the appeal from the chancery in Ireland lies immediately to the house of lords here: it being expressly declared, by the same statute 6 Geo. I. c. 5. that the peers of Ireland have no jurisdiction to affirm or reverse any judgment or decree whatsoever. The propriety, and even necessity, in all inferior dominions, of this constitution, "that though justice be in general administered by courts of their own, yet that the appeal in the last resort ought to be to the courts of the superior state," is founded upon these two reasons. First, because otherwise the law appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. Secondly, because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England (*n*).

Whatever praise the motives which produced the 6 Geo. I. might heretofore deserve, they have in more liberal and enlightened times been thoroughly investigated, and in the end, completely exploded, on the sound principles of policy and justice. On the 17th of May 1782, the situation of Ireland was taken into consideration by both houses of parliament, in consequence of addresses from the parliament of that kingdom. In the course of the debate here (in the house of commons), it was stated and admitted, that the act of the 6th of George the First, which had never been acknowledged by the legislature of Ireland, was the first object sought to be repealed by the parliament there; and that not only the parliament, but the united voice of the whole country had declared its illegality. The matter stood on so plain a position, that the argument came

(*m*) This was law in the time of Courts, c. bank le roy.

Henry VIII.; as appears by the ancient book, entitled, Diversity of (*n*) Blac. Com. 1 v. 102. Sulliv. 168. 209. 218. 221. Vaugh. 402.

inquisition touching the Welsh laws within their several commotes and seigniores; which inquisitions are yet of record.

home to the fact immediately, and proved the impolicy of one legislature making laws to bind another. Ireland had its representatives as well as England; it was under the same constitution, and therefore entitled to the same internal immunities.

The great points to which the claims of the Irish parliament were directed, appeared to be—the repeal of the 6th of George I.—the restoration of the appellat jurisdiction—the modification of the law of Poynings, and the repeal of the perpetuating clause in the mutiny bill.

And first, as to the 6th of George I. it was said to be downright tyranny, to make laws for the internal government of people, who were not represented among those, by whom such laws were made.—This was an opinion so founded in justice, that in no situation should it ever be departed from. The distinction between internal and external legislation was manifest;—and though it would be tyranny to attempt to enforce the former, in countries not represented in the British parliament, yet the latter was in reason and policy annexed to the British legislature; and which right of supremacy would never have given umbrage to any part of the empire, if it had been used solely for the general good; but when made an instrument of oppression, it was not wonderful, that it should excite discontent, and opposition. When local legislatures were established in different parts of the empire, it was clearly for the purpose of answering municipal ends; and the great superintending power of the state ought not to be called into action, but in aid of the local legislature, and for the good of the empire at large. But when ministers, as heretofore, judging by what they had, of what they might have, carried the principle of external to internal legislation, and attempted to bind the internal government of its colonies, by acts, in the passing of which the colonies had no voice—that power, which on proper occasions would have been cheerfully obeyed, created animosity and hatred, and had produced the dismemberment of an empire, which if properly exerted, it would have served to unite, and bind in the firmest manner. That Ireland had the same reason to spurn at this power of external legislation, because it had been employed only for the purpose of distressing her. Had Ireland never been made to feel that power, she never would have complained of it; and the best and most effectual way to have kept it alive, would have been, not to have made use of it. Ireland would then have suffered it to exist in the statute book; and never would have called for the renunciation

cord. After which, in the 12th of Edward I. the statute of Rutland was made, whereby the administration of justice in

nunciation of it. But it had been employed against Ireland, as an instrument of oppression, to establish an impolitic monopoly in trade; to enrich one country, at the expence of the other. When the Irish first complained of the monopoly (e), and asked as a favour, what they might have claimed as a right, they were opposed; and their demands, which were no less modest than just, were disregarded. It was not local or commercial jealousy, so common in all countries, which had operated to the disappointment of the Irish, at that time;—their demands were not only rejected, but the then first confidential servant of the crown came down to vote against them; the influence of the minister was exerted, and the rights and distresses of Ireland were consigned to oblivion. Thus the supreme power of the British parliament was employed to gratify a few, and to distress a whole kingdom.—What was the consequence? The Irish finding they had nothing to expect from the justice of their demands, found resources in themselves; they armed; their parliament spoke out; and the very next year, the very same minister who before had put a negative on all their expectations, came down to the house, and making *amende honorable* for his past conduct, gave to the demands of an armed people, infinitely more than he had refused to the modest applications of an unarmed, humble nation. Such had been the conduct of the then minister and his colleagues; and this was the lesson the Irish had been taught, “If you want any thing, seek not for it unarmed and humbly; but take up arms, speak manfully and boldly, and you will obtain more than you at first might have ventured to expect.” Such was the consequence of the ill use made of the superintending power of the British parliament; which was perverted from its true use, and instead of being the means of rendering the different parts of the empire happy and connected, had made millions of subjects rise up against a power which they felt only as a scourge.

That it was not the intention of parliament to pursue the footsteps of its predecessors; and therefore it would agree to the demands of the Irish relative to the 6th of George I. because it believed them to be founded in justice. He must be a shallow politician who would enforce obedience to laws, which were odious to those whom they were made to bind. That it was better to see Ireland totally separated from the crown of England, than kept in

(e) About the year 1778.

in Wales was settled in a method very near to the rule of the law of England. The preamble of the said statute is notable, viz.

“ EDVARDUS

obedience only by force : unwilling subjects were little better than enemies ; it would be better not to have subjects at all, than to have such as would be continually on the watch, to seize the opportunity of making themselves free. That if this country should attempt to coerce Ireland, and succeed in the attempt, the consequence would be, that, at the breaking out of every war with any foreign power, the first step must be to send troops over to secure Ireland, instead of calling upon her to give a willing support to the common cause.—Having said thus much of the repeal of the 6th of George I. which it was intended to agree to in the most unequivocal manner, the subject next touched upon was the *Appellat Jurisdiction*. Upon this question there was thought to be no difficulty whatever ; for when the great question of legislation was given up, it could not be of any consequence to maintain to this country, the jurisdiction in appeals : but even if that was a desirable object, or likely to strengthen the tie between the two countries, it must be given up, for the Irish insisted upon it ; and there was a particular reason for complying with their desires on that head. The decrees or judgments of our courts of law here, in matters of appeal, were to be carried into execution—where ? In Ireland. By whom ? By the people of Ireland : but as the people of Ireland had one and all declared, that they would not execute the order of any English tribunal, it would be nugatory and absurd to maintain the appellat jurisdiction to Great Britain ; consequently it would be better to give it up with a good grace, than to keep it as a bone of contention between the two countries. As to the *modification of Poynings' law*, it was admitted, that by that law, a strange alteration had been made in the form of the constitution of Ireland, by making the privy council of that kingdom a branch of the legislature ; and those who were acquainted with the nature of the interference of that privy council, knew it was of the greatest detriment to the state. It not only sometimes suppressed bills, which had passed the house of lords and commons *nemine dissentiente* ; but such was the nature of it, that bills were sometimes passed according to *form* indeed, but in *fact*, *nemine assentiente* ; when it was contrary to the intention of any man that such bills should pass :—they were nevertheless supported by all, in confidence that in the privy council they would be thrown out. This kind of conduct was merely to gain popularity ;

“ EDWARDUS Dei gratia rex Angliæ dominus Hiberniæ
 “ & dux Aquitaniæ omnibus fidelibus suis de terra sua de
 “ Snodon

men who did not wish to oppose popular opinions, which they did not approve, nevertheless unanimously gave way to those opinions, merely because they knew they would be rejected in the privy council.—And the interference of that body, and their power to stop bills in their progress from parliament to the king, was improper; no objection therefore could arise to advise his majesty to consent to the modification which they required, of that law, from which the privy council derived that power. But the jealousies of the Irish went farther; they were jealous of the interference of the English privy council; and it was admitted that the alterations which had sometimes been made by it in Irish bills, had given but too just cause for jealousy. It was generally understood in Ireland, that Irish bills were frequently altered in England with very little consideration, and sometimes by a single person (the attorney-general); which single person, the Irish imagined, made alterations without giving that attention to the bills, which the subject and importance of them required. Whether those opinions were in general well-founded could not be said, but this was evident, that like the 6th of George I. the power might still have remained, if an improper use had not been made of it. It had been grossly abused, in one instance, in particular. A bill had been sent over to England, wisely and justly granting indulgencies to the Catholics; in that same bill there was a clause, in favour of the Dissenters, for repealing the sacramental test; the clause was struck out, contrary to sound policy; as the alteration tended to make an improper discrimination between two descriptions of men, and did not tend to the union of the people. It was by such conduct that the Irish were driven to pronounce the interference of the English privy council in altering their bills, a grievance, though the power would never have been complained of, if it had never been abused.

As to the *mutiny bill*, it was not matter of surprise, that the Irish should object to a clause which gave perpetual establishment to a military force in their country. So hostile was such a clause to the constitution of England as well as of Ireland, that if the Irish had never mentioned that law among their grievances, it would have been the duty of every Englishman to have recommended the repeal of it. The Irish must naturally feel that jealousy for their constitution, which the English feel for theirs—and which they express by passing a mutiny law only for one year. The perpetuating clause had this effect also, that it rendered the interference of the English privy council more odious.

But

" Snodon & de aliis terris suis in Wallia salutem in Domino,

" Divina Providentia quæ in sua dispositione non fallitur,

" inter

But as it was possible, that if nothing more was to be done than what had been stated, Ireland might think of fresh grievances, and rise yearly in her demands, it was proper something should be done, towards establishing on a solid basis the future connection of the two kingdoms. That, however, was not to be proposed in parliament; it would be the duty of the crown to look to that; the business might be first begun by his majesty's servants in Ireland; and if afterwards it should be necessary to enter into a treaty, commissioners might be sent from the British parliament, or from the crown, to enter upon it, and bring the negotiation to a happy issue.

It was then moved, "that the 6th of George I. be repealed."

Upon which it was remarked, that the mere repeal of that act would not satisfy Ireland, because the repeal would leave the question just as it was before, and England would still have the same right which she before had, unless some counter-declaratory clause was inserted in the repealing act. The latter part of the 6th of George the First went only to appeals to the lords; but though that bill should be repealed, still there would remain an appeal to the courts of law here, by writ of error, to which the Irish would not submit; and therefore the whole ground of appeal should be done away.

The claims of the Irish, it was urged, were not novel; they were as old as Henry II. who had given them the laws and constitution of England; and of course, a parliament. The Great Charter was granted to them by Henry III. and they had a free and independent legislature till the year 1719, when the lords of England thought proper to resolve, that a cause which had been tried in appeal by the lords of Ireland, had been *coram non judice*; when, and not before, did England think of asserting by law her supremacy over Ireland; though the latter had, till that period, enjoyed the appellat jurisdiction.

The question was put, and carried *nemine contradicente*.

It was then moved, for leave to bring in a bill to repeal the 6th of Geo. I.—which also passed *nem. con.*; after which it was moved, that "an address be presented to his majesty, praying that he will "be graciously pleased to take such steps as shall tend to render the "connection between the two kingdoms solid and permanent."—This also passed unanimously.

It was next moved, "that the interests of the two kingdoms are "inseparable, and that their connection ought to be founded on a

" solid

“ inter alia sue dispensationis munera, quibus nos & reg-
 “ num nostrum Angliæ decorari dignata est, terram Walliæ
 “ cum incolis suis prius nobis JURI FEODALI SUBJECTAM,
 “ tam sui gratia in proprietatis nostræ dominium, obstaculis
 “ quibuscunque cessantibus, totaliter & cum integritate con-
 “ vertit, & coronæ regni prædicti tantum partem corporis
 “ ejusdem annexuit & univit. Nos, &c. (b).

ACCORDING to the method in that statute prescribed, has the method of justice been hitherto administered in Wales, with such alterations and additions therein as have been

(b) Vide note [B] and [D] on this chapter.

“ solid and permanent basis.”—This resolution passed also *nem. vox.* and the chairman having left the chair, and the house being resumed, he reported the resolutions, which were UNANIMOUSLY agreed to by the house.

Similar motions were made on the same day in the house of lords, which passed in the affirmative, with only one dissentient. In consequence of the resolutions, a bill was immediately brought in and passed, for the purpose of forwarding the wise and generous views of the British nation towards a brave, loyal, and oppressed people. By the 22 Geo. III. c. 33. the 6 Geo. I. c. 5. was repealed; but doubts being entertained, whether the repealing act was sufficiently comprehensive, it was afterwards, by 13 Geo. III. c. 28. enacted, that “the right claimed by the people of Ireland to be bound only by laws enacted by his majesty and the parliament of that kingdom, in all cases whatever, and to have all actions and suits, which may be instituted in that kingdom, decided in his majesty’s courts therein, finally and without appeal from thence, shall be established and ascertained for ever, and shall, at no time hereafter, be questioned or questionable. That no writ of error or appeal shall be received or adjudged, or any other proceeding be had, by or in any of his majesty’s courts in this kingdom, in any action or suit instituted in any of his majesty’s courts in the kingdom of Ireland; and that all such writs, appeals, or proceedings, shall be void.”

made by the several subsequent statutes of 27 and 34 H. VIII. &c [B].

[B] Wales, unconquered and uncultivated, for ages preserved its independence, against the continued attempts of a great and of a powerful people to subject it. Whether this may with greater propriety be ascribed to courage, to the situation of the country, or to a want of that, whatever it may be, which stimulates the ambition of conquerors, is not perhaps easy to determine: certain however it is, that the Saxons, instigated more by revenge than by any solid advantage which could possibly have been derived from the conquest of such a country, continually exerted every effort to subdue it.

At what period the Britons were first called *WELSH*, or from whence the word *Wallia* is derived, is not, I believe, as yet ascertained: laborious may have been the researches, various, no doubt, are the conjectures. From whatever origin the word may have been derived, it is not, however, unreasonable to suppose, that it was at first a term of reproach applied by the Saxons, the Welsh having almost invariably denominated themselves *Cymry*.

Blackstone, speaking of the Welsh, remarks, that when the Saxons themselves were converted to christianity, and settled into regular and potent governments, the retreat of the ancient Britons grew every day narrower; that they were over-run by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence (a). Of this there may be no question; a minute detail, therefore, of their reciprocal depredations, from the æra of the Saxon conquest to that of Edward the First, would be of very little, if of any, consequence: in truth their wars were equally savage and ferocious; each, as the scale of fortune preponderated, exhibiting massacre and devastation, fire and the sword. "Very early (adds Blackstone) in our history, we find their princes doing homage to the crown of England, till at length, in the reign of Edward the First, who may justly be styled the conqueror of Wales, the line of their ancient princes was abolished, and the king of England's eldest son became, as a MATTER OF COURSE, their titular prince (b)." If this assertion be but a little investigated, it may, perhaps, in the end, a little be doubted.

Under the conduct of Llewellyn ap Iorweth, and his son and successor David ap Llewellyn, the Welsh carried on a war with various success against the English. Llewellyn ap Gryffid, who succeeded his uncle David ap Llewellyn, was the last prince of Wales of the

(a) Com. iv. c. 93.

(b) Id. 94.

British blood; and it is in general admitted, that by the death, or, as some suggest, by the assassination of this prince, the Welsh were at length, not totally, though in a great measure, conquered by Edward the First; for it is probable that this conquest extended not to any other counties than those which are specified in the statute of Wales; (c) viz. Merioneth, Carnarvon, Anglesey, and Flintshire; and the counties of Carmarthen and Cardigan in South-Wales; in which counties only, Edward erected castles (d). Its old constitution, whatever that might have been, was now destroyed; and no good one substituted in its place. That care was intrusted to lords marchers—a form of government of a very singular kind; a strange heterogeneous monster; something between hostility and government (e). With Llewellyn expired the distinction of his nation; and though foreign conquests might add to the glory, yet this added to the felicity of England. To incorporate the victors with the vanquished, Edward granted lands in Wales to his followers; to prevent security and concealment, he destroyed the woods which had so often afforded safety to the enemy; and, the more effectually to subjugate the country, castles were erected, which he took especial care sufficiently to garrison. However lenient, or however politic the conduct, yet surely it must have been accompanied with some degree of severity, or the brave Llewellyn would not so feelingly have complained—"Nam nos adeo spoliati eramus (says Llewellyn) immo in servitutem redacti per justiciarios & ballivos regis; amplius quam si Saraceni essemus, vel Jædei denunciavimus domino regi, sed semper mirtebantur justiciarii et ballivi ferociiores et crudeliiores; et quando illi saturati erant per injustas exactiones; alii de novo mirtebantur ad populum exorciandum, in tantum quod Wallensis malebat mori quam vivere (f)." Thus woe-fully experiencing the cruelty and rapacity of the English, the Welsh, however reduced, were unwilling peaceably to submit to the power of Edward, and therefore boldly insisted on being governed by a prince of their own country. To effect this purpose, Edward dispatched his queen, when pregnant, to Caernarvon castle, where she was delivered of a son (g), who in consequence was honoured with the title of Prince of Wales. By this politic condescension, Edward complied with the literal import of the request, but at the same time avoided the spirit and intention of it. Thus the territory of Wales, as Mr. Justice Blackstone conceives (h), became entirely re-annexed, by a kind of feudal resumption, to the dominion of the crown of Eng-

(c) Statutum Wallie—12 Edw. I. Appendix to 4to. Ed. ed. stat. p. 3.

(d) Bar. Ob. Stat. 104.

(e) Ed. Burke.

(f) Appendix to Wynne's Hist. of Wales.—Bar. Ob. Stat. 324.

(g) Edward II.

(h) Com. 1 vol. est. 94.

land (i); or, as the statute of Rhuddlan (k) expresses it—"terra Wallie cum incolis suis, prius regi *jure feudali subiecta*, (of which "homage was the sign) jam in proprietatis dominium totaliter et "cum integritate conversa est, et coronæ regni Angliæ tanquam pars "corporis ejusdem annexa et unita (l)." The expression *jure feudali subiecta*, is somewhat remarkable, as it is believed (m) that no instance can be found of a *jus feudale* prevailing in ENGLAND: we hear indeed of the word *feodum*, and the distinction between the *feodum novum* and the *feodum antiquum*, but of a REGULAR SYSTEM of feudal law, which this expression seems to indicate, there are but very slight traces. Edward however, was a conqueror, and had a right to make use of his own words, in the preamble to his own law. It may not be impertinent to observe, that though of late years some very ingenious attempts have been made to explain our antient common law by feudal principles, yet it is more than probable that neither Lyttleton nor his learned and laborious commentator knew that such a law had ever prevailed in any part of Europe.

The more effectually to blend the vanquished with their conquerors, Edward was not only desirous of having the laws of Wales reviewed, but of having them compared, and if possible rendered consonant with those of England; to accomplish which he directed proper enquiries to be made before certain commissioners, over whom the bishop of St. David's was appointed to preside. The certificates and returns of the commissioners are printed in the appendix to the Laws of Hoel Dha, or The Good, the legislator (n) of the Britons, and contain many curious particulars (o). It was, with truth, conceived, that the custom of gavelkind had in a violent degree promoted public and hereditary feuds; sovereignties as well as private property being, by the custom of Wales, divisible among all the male issue, whether legitimate or not.

Some have thought that the equal partition of private estates among the male issue, tends not only to the promotion of agriculture, but to the increase of population; and that in a government founded on equality and liberty, it is the medium which curtails the wealth

(i) Vaugh. 400.

(k) 10 Edw. I. Roteland, or more properly Rhudd-lan, or Rhyd-land.

(l) Vide note [D] on this chapter.

(m) Obs. on Stat. 107.

(n) The prince of Wales, without question, had legislative authority; he could, *ad libitum*, alter, abrogate, and enact laws; yet in the exercise of this extensive power, whether delegated or assumed, it

became him to act in strict conformity with the public good; for the disapprobation of the ancient Britons was shewn, not by ineffectual petitions, but by the sword—when the sovereign ceased to be deserving, he ceased to be a prince. There is a transcript of the laws of Hoel Dha in the Harleian collection of MS. in the British Museum. See Astley's Pref. to the Index of that collection.

(o) Bar. Obs. on Stat. 105.

and the power of individuals. Others conceive that the custom of lands descending to the youngest son, which we term Borough-English, in preference to the other sons, has a more rational foundation than the exclusive descendibility to the eldest; he being supposed, and not very unreasonably, more capable of maintaining himself than the youngest; who might probably be of such tender years, as to be altogether unable to provide for himself, on the decease of his ancestor.

In consequence of the enquiries which Edward had directed to be made, the custom of gavelkind, notwithstanding the distraction which was the result of its existence, with some other customs which had long been prevalent in Wales, was retained; others indeed were altered, and some were abolished, by the statute of Wales, which was made in the 12th year of the reign of Edward the First, A. D. 1284. This statute bears date "apud Rothelanum (Rhyd-land in Flintshire) die Dominica in medio quadragesime anno regni nostri duodecimo." Barrington (p) observes on this statute, that it is certainly no more than regulations made by the king in council for the government of Wales, which, if the preamble be credited, was now totally subdued. This law, though it has been but little attended to, either by lawyers or historians, merits particular notice, because it not only makes known what were then the laws and the customs of Wales, but, by its remedial injunctions, discovers likewise what, at that time, was the law of England.—By this statute many material alterations were made in many parts of their laws, to reduce them nearer to the standard of the English, especially in the forms of their judicial proceedings: but they still retained very much of their original polity, and in particular their rule of inheritance (q); for their custom of gavelkind was continued till the time of Henry the Eighth. Notwithstanding these seemingly good intentions of Edward, the manners of the Welsh followed the genius of their own government. The people were ferocious, restive, savage, and uncultivated: sometimes composed, never pacified. Wales within itself was in perpetual disorder, and kept the frontier of England in perpetual alarm. Benefits from it to the state, there were none. Wales was known only to England by incursions and invasions (r). Many of the Welsh, from the desire of plunder (s), or from a rooted antipathy against their conquerors, were still inclined to disorder; and under the conduct of Owen Glyndowr, emboldened by a confederacy with the potent earls of Worcester and Northumberland, their untractable spirit broke forth

(p) Obs. on Stat. 104.

(r) Ed. Burke.

(q) Blac. Com. 3 vol. oct. 94.

(s) Barr. on Stat. 329.

in insurrection. Henry the Fourth had the good fortune to defeat this formidable combination, and by the decisive battle of Hulse, put an end to the aspiring hopes of Owen. This was the last struggle which the Welsh made for the recovery of their liberties, and the English, now having entirely subjected them, treated them rather as slaves than as subjects. Subsequent to the statute of Wales, and anterior to the subjugation by Henry, their provincial immunities had been at different times abridged; now, by an ill-judged severity, they were prohibited from the enjoyment of any offices, and from the purchasing of any lands:—even penal laws were enacted to prevent the English from intermarrying with the Welsh (1). Thus, instead of healing the wounds occasioned by insurrection, was the breach which subsisted between the two nations extended. All this while Wales rid this kingdom like an *incubus*—it was an unprofitable and oppressive burthen. The march of the human mind is slow. It was not, until after two centuries, discovered, that by an eternal law, Providence had decreed vexation to violence, and poverty to rapine. Our ancestors did however at length open their eyes to the ill husbandry of injustice. They found that the tyranny of a free people could, of all tyrannies, the least be endured; and that laws made against an whole nation, were not the most effectual methods for securing its obedience (2). Accordingly, in the reign of Henry VII. who was descended from the princes of North-Wales, the court was entirely altered, and the Welsh experienced greater favour. By his son and successor Henry VIII. the union of England and Wales was happily and politically effected. Previous steps having been taken to introduce a union of laws between the two countries (3), the finishing stroke to the independency of the Welsh was, as Blackstone remarks (4), given by the stat. 27. Henry VIII. c. 26. which at the same time gave the utmost advancement to their civil prosperity. By this medium, political order was established; the military power gave way to the civil; the marches were turned into counties. The title of it is, “an act concerning laws to be used in Wales (5).” By this statute it is enacted, First, that the dominion of Wales shall be forever united to the kingdom of England. Secondly, that all Welshmen born shall have the same liberties as other the king’s subjects. Thirdly, that lands in Wales shall be inheritable according to the English tenures and rules of descent. Fourthly, that the law of England, and no other, shall be used in Wales, beside many other regulations of the police of this principality. But that a nation should have a right to English liberties, and yet no share at all in the fundamental security of those liberties,

(1) Barr. Obs. Stat. 324. 329.

(2) Ed. Burke.

(3) Barr. Obs. Stat. 457.

(4) Corn. i. vel. c. 94.

(5) 4to. Stat. vol. 2. p. 240.

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the grant of their own property, seemed a thing so incongruous, that eight years after, that is, in the thirty-fifth year of that reign, a complete and not an ill-proportioned representation by counties and boroughs was bestowed upon Wales, by act of parliament (a). From that moment, as by a charm, tumult subsided; obedience was restored; peace, order, and civilization, followed in the train of Liberty:—when the day-star of the English constitution had arisen in their hearts, all was harmony within and without (a).—

Simul alba nautis

Stella refulsit,

Defluit saxi agitatus humor :

Concidunt venti, fugiuntque nubes :

Et minax (quod sic voluere) ponto

Unda recumbit.

The statute 34 and 35 Henry VIII. c. 26. entitled, “an act for certain ordinances in the king’s dominion and principality of Wales (b),” confirms the other act. This act not only adds farther, but also contains a more complete code of regulations for the administration of justice; with such precision, and such accuracy, that no one clause of it, according to Mr. Barrington (c), hath ever yet occasioned a doubt, or required an explanation.

It begins by dividing Wales into twelve shires; before, as lord Herbert of Cherbury asserts (in his Life of Henry VIII.), it consisted of one hundred and forty lordships marchers, with *jura regalia*, and the grand object of this statute was to reduce their jarring customs to uniformity. In short, this act reduced Wales into the same order in which it at present stands; differing from the kingdom of England only in a few particulars (such as having courts within itself INDEPENDENT of the process of Westminster-hall), and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself (d). It hath already been said, that this statute is so clear, that it hath not ever required either exposition or alteration. Lord Bacon (e) hath just abridged some of the regulations, thinking perhaps, that they spoke sufficiently for themselves. Mr. Justice Doderidge pursued the same mode in his account of the principality, without offering any other observation than that the justices of the great session have the same powers with “the antient justices in eyre.” He could not by this mean that the

(a) 34 & 35 Hen. 8. c. 26. sec. 110.

(a) Edm. Burke.

(b) 4to. Stat. vol. 2. pa. 348.

(c) Obf. on Stat. 456.

(d) Blac. Com. 1 vol. oct. 95.

(e) In his Law Tracts.

justices in eyre had authority to decide causes in a court of equity, which the justices of the great session have so long exercised, that it cannot now be disputed: how they originally obtained this jurisdiction cannot be easily ascertained, as in the 34 and 35 Henry VIII. which enumerates every officer in the courts of law, there is not the least allusion to any proceedings in equity (f).

Thus were united a people hitherto distracted with continual animosity; and thus, to use the words of the elegant commentator, were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing and made fellow-citizens with their conquerors (g).

With the greatest deference to Mr. Justice Blackstone and Mr. Barrington, the statute of 34 and 35 Henry VIII. cannot now be deemed a complete code of regulation for the administration of justice in Wales: in truth, whoever attentively considers the mode of judicial proceedings, as conducted in Wales, compared with that which is pursued in this kingdom, must immediately acknowledge the manifest superiority of the latter. It is true, that they have in Wales a court, somewhat improperly called the court of grand sessions, in which is transacted all professional business, either at law or in equity. —But if it be apparent, that the common people are in general ignorant of the English language—that where the cause of action exceeds ten pounds, the parties may try it at the next English county, by which means either the plaintiff or the defendant is frequently obliged at a great expence, and at great trouble, to bring witnesses from a very distant part, to try a very trifling cause, and by such means affording to the opulent, too frequent opportunities to harass and oppress the indigent—it must be obvious that what was originally intended as a benefit, is now become a grievance—and that as the reason (b) for trying causes in the next English county has long since ceased, the practice should cease also.—Were the judicial proceedings in every respect the same as in England, and Wales joined to the English circuits, there would not then, perhaps, exist any partial distinction between the inhabitants of England and of Wales—they would then have the same laws, the same justice, the same government, and in time the same language. On the whole, it is to be hoped by every one who understands, and understanding wishes to promote the real interest of the principality, that every distinction between England and Wales, whether arising from a

(f) Obs. on Stat. 459.

(g) Blac. Com. 1 vol. c. 94.

(b) Which was to procure a more

impartial trial, on account of the party factions which generally prevailed in Wales.

diffc-

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TOUCHING the Isle of Man. This was sometimes parcel of the kingdom of Norway, and governed by particular laws and customs of their own; though many of them hold proportion, or bear some analogy, to the laws of England, and probably were at first and originally derived from hence; seeing the kingdom of Norway, as well as the Isle of Man, have anciently been in subjection to the crown of England. Vide *Legis Willi. primi*, in Lambard's Saxon Laws [C].

difference of manners and of customs—from the mode of administering justice, or even from the language itself, may be entirely done away.

In Hilary 21 Geo. II. the great question, “whether the court of grand sessions in Wales possessed a jurisdiction *exclusive* of “that of the court of king’s bench,” was agitated. The case is elaborately reported in 1 *Wils.* 193. In that case, the determination was in favour of the *exclusive* jurisdiction contended for. —But it has been since over-ruled. See *Doug.* 202. and note [D] on this chapter.

[C] The Isle of Man is a distinct territory from England, and is not governed by our laws: neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there (a). It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to king John and Henry III. of England; afterward to the kings of Scotland; then again to the crown of England: at length we find king Henry IV. claiming the island by right of conquest, and disposing of it to the earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley, by letters patent 7 Henry IV.

Those who formerly possessed this territory, styled themselves kings. *Rex Manniæ & Insularum*, was a common inscription on their seals, and in truth they were so titled by their superior lords. *Sciatis*, says Henry the third (b), *quod dilectus et fidelis noster Reginaldus rex de Man venit ad fidem & servitium nostrum & nobis homagium fecit*. But they were also, in later times, titled the lords of

(a) 4 Inst. 284. 2 And. 116.

(b) Pat. 3 Hen. 3. membr. 1.

Man, domini Mannie, by which title the dignity was not so restrained that the name of king was taken away. For it is related, that the lords of Man had withal the name of king, and might use also a crown of gold: so says Thomas of Walsingham, where he relates, that William Montague, earl of Salisbury, under Richard II. sold the isle to sir William Scrop; *Willielmus Scrop (c) emis de domino Willielmo de Montecuto comite de Sarum insulam Eubonia* (which is the old name of the isle) *CUM CORONA, NEMPE DOMINUS HUIUS INSULE REX VOCATUR, CUI ETIAM FAS EST CORONA AUREA CORONARI*: and another to the same purpose in the public library at Oxford (*d*); *Est nempe jus illius insule ut quisquis illius sit dominus rex vocetur, cui etiam fas est corona regia coronari*. But in these gifts of this island which were made by our kings to such as have been since stiled kings of Man, the name of king or kingdom is not to be found, only the title of lord; but with liberty to hold it as amply and as freely as any had before held it. Whilst it was in the hands of the earl of Salisbury, he stiled himself only lord of Man, *Seigneur de Man*.

By the name of lordship also, it was given by Henry the Fourth to Henry earl of Northumberland, as an island won by conquest from sir William Scrop. The words of the patent are remarkable; —he gives him (*e*) *insulam castrum Pelam et dominium de Man ac omnia insulas et dominia eidem insule de Man pertinentia, quæ fuerunt Willielmi le Scrop chivaler defuncti quem nuper in vita sua conquesti fuimus et ipsum sic conquestatum decrevimus & quæ ratione conquestus illius tanquam conquestata cepimus in manum nostram, quæ quidem decretum & conquestus in præsentis parlamento nostro, (that is the parliament of the first year of his reign) de assensu dominorum temporarium in eodem parlamento existentium quoad personam præfati Willielmi ac omnia terras et tenementa bona et catalla sua tam infra dictum regnum quam extra ad supplicationem communitatis dicti regni nostri affirmata existunt*.

Some years afterwards the earl of Northumberland forfeited it, and it was in the same words given to sir John Stanley (*f*), to hold in fee by the tenure of two falcons, to be presented to the king at his coronation; but the tenure of the earl of Northumberland was to carry the sword called Lancaster sword, which Henry the Fourth wore when he first arrived in England, at the coronations of the king and his successors (*g*).

(c) 7 Rich. 2. sub ann. D. 1393. p. 337.

(d) Chron. ms. ab ann. 43. H. 3. and 7 H. 5. cui sciolus aliquis nomen Guil. Ribbonyer temere nuper præfixit sub ann.

D. 1392.

(e) Pat. 1 H. 4. part 5. membr. 36.

(f) Pat. 7 H. 4. part 2. membr. 18.

(g) Seld. Tit. Hon. 1. 3.

COMMON LAW OF ENGLAND. 27

In his lineal descendants it continued for eight generations, till the death of Ferdinand, earl of Derby, A. D. 1594; when a controversy arose concerning the inheritance thereof, between his daughters and William his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent (*b*), the island was seized into the queen's hands, and afterwards various grants were made of it by king James the First; all which being expired or surrendered, it was granted afresh in 7 Jac. I. to William earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On the death of James earl of Derby, A. D. 1735, the male line of earl William failing, the duke of Athol succeeded to the island, as heir general by a female branch. In the mean time, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein, by assenting to or dissenting from laws, and exercising an appellat jurisdiction. Yet though no English writ, or process from the courts of Westminster, was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council, as is apparent from the case hereafter stated. But the distinct jurisdiction of this little subordinate royalty, being found inconvenient for the purposes of public justice, and for the revenue, authority was given to the Treasury by the 12 Geo. I. c. 28. to purchase the interest of the then proprietors, for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III. c. 26 and 39. whereby the whole island and all its dependencies, so granted (except the landed property of the Athol family, their manerial rights and emoluments, and the patronage of the bishoprick (*i*) and other ecclesiastical benefices) for the sum of 70,000*l.* are unalienably vested in the crown, and subjected to the regulations of the British excise and customs (*k*).

The earl of Derby, king of the Isle of Man, made a decree in that island concerning lands there; the person, against whom the decree was made, appealed to the king of Great Britain in council; and the principal question was, whether an appeal did lie before the king in council, there being no reservation in the grant, made of the Isle of Man by the crown, of the right of appeal to the crown.

(*b*) Camden Eliz. A. D. 1594.

(*i*) The bishoprick of Man, or Sodor, or Sodor and Man, was formerly within the province of Canter-

bury, but annexed to that of York by statute 33 Henry VIII. c. 31.

(*k*) Blac. Com. 1 v. 105.

BERWICK was sometimes parcel of Scotland, but was won by conquest by king Edward I. and after that lost by king Edward II. and afterwards regained by Edward III. It was governed by the laws of Scotland, and their own particular customs, and NOT ACCORDING TO THE RULES OF THE COMMON LAW OF ENGLAND, further than as by custom it is there admitted: as in *Liber Parliamenti*, 21 Edw. I. in the case of Moyne and Bartlemew, *pro date*, in Berwick. Yet now by charter, they send burgeses to the parliament of England [D]. Vide *Rot. Parl.* 16 R. II. n. 41, 42.

It was urged for the appeal, that it appearing Henry IV. had granted the isle of Man to the earl of Derby's ancestors, to hold by homage and other services, though there was no reservation of the right of appeal to the crown, yet that liberty was plainly implied. That such a liberty of appeal lay in all cases where there was a tenure of the crown; that it was the right of the subject to appeal to the sovereign, to redress a wrong done in any court of justice; nay, if there had been express words in the grant to *exclude* appeals, they had been void; because the subject had an inherent right, inseparable from him as subject, to apply to the crown for justice. That the king, as the *fountain of justice*, had an inherent right inseparable from the crown, to distribute justice among his subjects; and if this were a right in the subjects, no grant could deprive them of it; the consequence of which would be, that in all cases where there were words exclusive of such right of appeal, the king would be construed to be deceived, and his grant to be void.

Lord Chief Justice Parker, who assisted upon the occasion, thought that the king in council had necessarily a jurisdiction in this case, in order to prevent a failure of justice; whereupon their lordships proceeded in the appeal, and determined in favour of the appellant (k).

[D] The town of Berwick upon Tweed was originally part of the kingdom of Scotland; and, as such, was for a time reduced by Edward I. into the possession of the crown of England; and, during such subjection, it received from that prince a charter, which

(l) Christian v. Corren, Peere Wms. 1 v. 329. 2 Eq. Ca. Abr. 81. pl. 3.

(after

(after its subsequent cession by Edward Balliol, to be for ever united to the crown and realm of England) was confirmed by Edward III. with some additions; particularly that it should be governed by the laws and usages which it enjoyed before its reduction by Edward I. Its constitution was new-modelled, and put upon an English footing by a charter of James I. (a) and all its franchises were confirmed in parliament by the 12 Edw. IV. c. 8. and the 2 Jac. I. c. 18. therefore though it has some local peculiarities, derived from the ancient laws of Scotland, yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or not. And therefore it was (perhaps superfluously) declared by the 20 Geo. II. c. 42. that where England only is mentioned in an act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and town of Berwick upon Tweed. And tho' certain writs from the courts at Westminster do not usually run into Berwick, any more than into the principality of Wales, yet it hath been solemnly adjudged that all prerogative writs (as those of *mandamus*, prohibition, *habeas corpus*, *certiorari*, &c.) may issue to Berwick, as well as to every other of the dominions of the crown of England and that indictments and other local matters arising in the town of Berwick, may be tried by a jury of the county of Northumberland (b).

Towards the latter end of the reign of George the Second, the constitution of Berwick was legally and thoroughly investigated. The cause which gave rise to the investigation, was that of the King against Cowle; which came before the court of king's bench in the form of a motion, to shew cause "why a superſedeas should not issue to a *certiorari*, which had been directed to the mayor and corporation, justices of Berwick (c)."—After all the charters of the corporation had been produced and minutely inspected, and after many elaborate arguments, by counsel, on both sides, the earl of Mansfield delivered the opinion of the court to the following effect.

The objections urged against the *certiorari* were principally—That the court of king's bench had no jurisdiction over the town and borough of Berwick, or any local matters arising there; because it was not to be deemed part of the realm of England, and the king's writ did not run there; consequently, the court had no au-

(a) For the several charters, particularly that of James the First, and under which the corporation of Berwick claim all their privileges, see 2 Burr. 836. seq.

(b) Blac. Com. 1 v. 99. 1 Sid. 382. 462. 2 Show. 365. Cro. Jac. 543. 2 Roll Abr. 292. Stat. 21 Geo. 2. c. 4.

(c) 2 Burr. 834. seq. authority

thority to remove a record from thence, by writ of certiorari, for any purpose whatsoever.

That supposing the court might, for some purposes, have jurisdiction, yet the end for which the Certiorari was desired, could not possibly be attained.

The best way, said lord Mansfield, of considering this question, is concisely to deduce the condition and constitution of Berwick, contrasted with Wales; to shew that arguments from the case of Wales held to Berwick, equally at least in all respects; in many *à fortiori*.

Edward the First conceived the great design of annexing all other parts of the island of Great Britain to the realm of England. The better to effectuate his idea, as time should offer occasion, he maintained "that all the parts thereof not in his own hands or possession were holden of his crown." The consequence of this doctrine was, that, by the feudal law, supreme jurisdiction resulted to him in right of his crown, as sovereign lord, in many cases which he might lay hold of, and when the territories should come into his possession, they would come back as parcel of the realm of England, from which (by fiction of law at least) they had been originally severed.

This doctrine was literally true, as to the counties palatine of Chester and Durham.

But, no matter upon what foundation, he maintained that the principality of Wales was holden of the imperial crown of England: he treated the prince of Wales as a rebellious vassal; subdued him; and took possession of the principality. Whereupon, on the 4th of December in the 9th year of his reign, he issued a commission to enquire "*per quas leges et per quas consuetudines antecessores nostri reges regere consueverant principem Walliæ et Barones Wallenses Walliæ et pares suos et alios inferiores et eorum pares, &c* (a).

If the principality was feudatory, the conclusion necessarily followed; "that it was under the government of the king's laws, and the king's courts, in cases proper for their interposition;" though, like counties palatine, they had peculiar laws, and peculiar customs, *jura regalia*, and complete jurisdiction at home.

There was a writ issued at the same time to all his officers in Wales, "to give information to the commissioners;" and also many interrogatories, specifying the points to be enquired into. The statute of Ruriland (b) refers to this inquiry. By that statute he does not

(a) Rotul. Walliæ, 9 Ed. 1. m. 5. *Leges Walliæ, Hocli Boni*, 518. published by Wotton.

(b) 12 Ed. 1. See it in the 2d vol. of the book of old statutes, intitled "*Statuta Walliæ*."

annex Wales to England, but recites it as a consequence of its coming into his hands—" *Divina Providentia terram Walliæ prius nobis jure feodali subiectam, jam in proprietatis nostræ dominium convertit, et corona regni Angliæ TANQUAM PARTEM CORPORIS EJUSDEM, annexuit et univit.*"

The 27 H. VIII. c. 26. adheres to the same principle, and recites "that Wales EVER HATH BEEN incorporated, annexed, united, and subject to, and under the imperial crown of this realm, as a very member and joint of the same."

Edward the First having succeeded as to Wales, maintained also, "that Scotland was holden of the crown of England."

That jurisdiction which resulted to him as superior lord, he often exercised, as sitting in this court. And as the court exercised that jurisdiction which resulted to the king in capacity of superior lord of Scotland; *a fortiori* it did so, when the country came into the king's possession. Therefore it was that the court of king's bench (i) actually sat at Roxburgh in Scotland.

While he continued in possession of Scotland, he granted a charter to the town and borough of Berwick, under the great seal of England, notwithstanding he then had a great seal of Scotland (g). The charter requires the mayor to be sworn before his chancellor or treasurer and barons of his exchequer in Scotland; and the writ to chuse a coroner, is to issue out of his chancery in Scotland. He seems to consider the whole country as united into one realm: for the privileges are given—" *per totum regnum et potestatem nostram in terra et potestate nostra.*"

In a few years Berwick with the rest of Scotland was lost; and continued so, many years.

Edward the Third renounced all pretension to the kingdom of Scotland, in property, or superiority, *divisum à regno Angliæ.*

Edward the Third procured from King Edward Baliol, and the parliament of Scotland, a grant and cession of Berwick, separate from Scotland, "for ever, *et regali dignitati et coronæ ac regno Angliæ perpetuis temporibus annexa, unita, et incorporata.*" In the tenth year of his reign he granted to Berwick an exemplification and confirmation of the charter of Edward I. (c).

Berwick was again lost when Edward the Third was in France; and retaken after his return; and, in the thirtieth year of his reign, he granted a new charter, confirming the former, with some additions; particularly, that they should be governed by the laws and usages which they had enjoyed in the time of Alexander late king of Scotland.

(c) 6, 7, 8, Ed. 3. Rymer vol. 4. pa. 536. 590. to 595. 614.

Berwick was again lost; and again recovered by Edward the Fourth, who confirmed the former charters, by charter (d) and act of parliament (e).

Between this time and the 33 of Hen. VIII. (particular time does not appear, because the returns are lost), Berwick was summoned, as a borough of England, to send members to parliament. They did so till the Union; and they still continue to send members to the parliament of Great Britain, BY SUMMONS, as being parcel of the realm, not under any of their charters; none of which give them such a right. That of Edward the Fourth is an *inpetimus* of the preceding ones, and the charters of 19 April, 1. H. VIII.—23 April, 1 Qu. Mary.—4 May 1 Eliz. are confirmatory charters only; none of which give them a right to send members to parliament; and yet they have sent them ever since the time of Henry the Eighth.

Their present constitution is under letters patent, granted by James the First (f), which are expressly confirmed by act of parliament (g); under these they act; and they have had no charter since.

Before the Union, Berwick, as well as Wales, was bound by every English GENERAL act of parliament, as being part of the realm of England. Where it is particularly named in acts of parliament, it is superfluous: so is the mention of Wales. If it was not part of England before the Union, it is now no part of Great Britain; for only England and Scotland are united. It is bound by all general laws since the Union.

In general acts, not applicable to Scotland, and where Scotland is not intended to be included, the method is, BY PROVISION, to declare that the act does not extend to Scotland. Where provisions are made for that part of Great Britain called England, Wales and Berwick upon Tweed are comprehended under that description.

Wales, from the time it first came into the hands of Edward the First, was deemed to be within the realm, upon the doctrine of having been holden before of his crown; and in consequence of such tenure, by rational deductions from the principles of our common law, this court exercises jurisdiction over matters in Wales, and which is not given by any act of parliament.

Scotland was considered in the same light. This court exercised sovereign jurisdiction over it, as well before it came into the king's hands as afterwards. The chance of war refuted the claim of the rest of Scotland, as belonging to England; and confirmed it as to Berwick.

(d) 22 Ed. 4.

(e) 22 Ed. 4. c. 8.

(f) 20 April 2 J. 1.

(g) 2 J. 1. c. 28. called in Hawkins's edition 1 J. 1. c. 28.

But if Berwick were to be deemed a dominion of the crown, and no part of the realm of England, it may nevertheless be under the controul, and subject to the superintendence of the king, in this court.

The constitution given to Berwick by the crown of England, approved by parliament, shews it necessarily is so; much stronger than in the case of counties palatine, or Wales. The people of Berwick have not *jura regalia*, or a complete jurisdiction within themselves, like a county palatine. They have no sovereign courts of the king within themselves, like Wales. They are made a free borough, to hold in burgage, by rent. Such a creature of the law must of necessity be connected as part of a kingdom, and subordinate.

In the time of king Alexander, they were subject to the supreme court of Scotland. They could have no laws or customs but such as were suitable to the subordinate condition of a borough.

The metamorphosis from a Scotch to an English borough, did not render them independent; it only changed the sovereign jurisdiction. They are made a corporation in England; to sue or be sued in that capacity in England; to take lands in that capacity in England. The burgesses, in that capacity, are to enjoy many privileges in England: they send representatives to parliament, BY SUMMONS, as a borough in England.

This court ALONE can judge of their franchises, as a corporation; who are entitled as members of it; what are their privileges; and whether they continue to exist or not. As if you suppose a question to arise "whether they are dissolved;" or "who is mayor;" who can judge but this court? The charter of James supposes it, because he commands the attorney and solicitor general to bring no writ of *quo warranto* for things past. In Hilary Term 14, 15. Car. 2. a *quo warranto* was brought in this court against the mayor, bailiffs, and burgesses of Berwick, but not proceeded in.

Another part of their constitution, more immediately applicable to the present question, is what relates to pleas of the crown.

The charter grants them a court leet, agreeable to the laws and statutes of England; a commission of peace and *oyer* and *terminer*, with the same authority which belongs, or may belong to justices of the peace in England, and to hear and determine in like manner as justices of peace, by the laws and statutes of England. It grants them a commission of gaol-delivery, under which they must proceed by indictment, according to the course of the law of England; as in fact they always have done.

The charter gives them power to make ordinances with penalties, so as the penalties be reasonable, and not repugnant to the laws of England. In short, they have no criminal law but the law of Eng-

land; and no criminal jurisdiction, but with such a reference to the law of England as of necessity includes this court.

Suppose they should adjudge a man to death for a crime not capital by the law of England—suppose they should indict a man for disobeying an ordinance repugnant to the law of England—suppose they should indict a man for treason, though the fact would not amount to treason within our laws—suppose, as justices of the peace, they should issue illegal orders, without any authority, in a summary way, there can be no redress but here; and if this court could not interpose, they would, under the grant of a limited, subordinate authority, be, in every sense of the word, absolute.

Another objection is, “the king’s writ does not run there.”

That is applicable only to the writ of *venire*, and other jury process; or perhaps, to ORIGINAL writs, which are the commencement of suits between party and party.

When this court removes, by writ of *certiorari*, an indictment for a misdemeanor from Wales, the Welch sheriff is commanded to cause the defendant to appear; and when he has appeared, and issue is joined, there is a suggestion, “that the king’s writ does not run into Wales.” So the very record which says the “king’s writ does not run,” shews many that do.

The reason why a *venire* does not run to Berwick, is, because they are exempted from being summoned out of the borough to serve upon juries.

But the charter supposes that other writs, ministerially directed, may run: because the return of all writs, precepts, and process issuing out of the king’s courts, and the execution thereof, is granted to the mayor, bailiffs, and burgessees, exclusive of any sheriff, minister, or bailiffs.

Writs not ministerially directed, (sometimes called prerogative writs, because they are supposed to issue on the part of the king) such as *mandamus*, *prohibition*, *habeas corpus*, *certiorari*, are not restrained by any clause in the constitution given to Berwick. Upon a proper case, they may issue to every dominion of the crown of England.

There is no doubt as to the power of this court, where the place is under the subjection of the crown of England: the only question is as to the propriety.

To foreign dominions which belong to a prince who succeeds to the throne of England, this court has no power to send any writ of any kind. We cannot send a *habeas corpus* to Scotland, or to the Electorate; but to Ireland, the Isle of Man, and the plantations, to Guernsey and Jersey, we may; and formerly it lay to Calais, which was a conquest, and ceded to the crown of England by the treaty of Bretigny.

But notwithstanding the power which the court has, yet where it cannot judge of the cause, or give relief, it will not interpose. Therefore upon imprisonments in Guernsey and Jersey, in Minorca, and in the plantations, I have known complaints to the king in council, and orders to bail or discharge. But I do not remember an application for a writ of *habeas corpus*. Yet cases have formerly happened of persons illegally sent from hence, and detained there, where a writ of *habeas corpus* out of this court would have been the most proper and effectual remedy.

In Cro. Jac. 543. a precedent is cited of a *habeas corpus* to Berwick. I have caused the records to be searched for that case: and the orders of the court and return to the writ of *habeas corpus* are found. The court had fined the mayor and bailiffs of Berwick 200*l.* for not returning the writ; they had also issued an *alias habeas corpus*. The *alias habeas corpus* not being returned, they ordered the fine to be estreated, and that a *pluries habeas corpus* should issue *sub pænâ 500 merè* returnable immediately. At the same time they issued an *alias* attachment against the mayor and bailiffs; and ordered the Governor of Berwick to execute it. The next day the estreat of the fine was suspended, on the applicant being discharged out of prison, and bailed to appear, on the octave of St. Hilary, being the return of the attachment against the mayor and bailiffs.

In Hilary Term they are ordered to return the *pluries habeas corpus*. And afterwards the mayor and two of the bailiffs were committed, and examined upon interrogatories, as in contempt; and two of them were ordered to find bail at the suit of the applicant, before they were discharged.

The return states the charter of Edward III. and that by their laws and customs, the Guild had authority to punish for colouring foreigners goods, or being in partnership with a foreigner, by fine, imprisonment, and disfranchising. They state that Henry Brearly (the party) was found guilty of being in partnership with a foreigner, and fined 100*l.* which he not only refused to pay, but treated them with scandalous and contumelious reproaches: That they therefore duly committed him to prison till the fine should be paid, and disfranchised him.

There is an order the same Hilary Term, stated to be upon the recommendation of the court, (therefore I suppose by consent) that "the fine of 100*l.* set upon Brearly by the Guild, should be reduced "to 50*l.* and that upon his submission he should be restored to his "freedom." But he was to remain disfranchised till he should make his submission.

As to the other prerogative writ of prohibition, it was taken for granted, in 2 Rol. Abr. 292. "that a prohibition lay out of this "court to the consistory of Durham, in a matter arising in Berwick;" though the suggestion "that the land out of which the "tithes were claimed lay in Scotland and not in Berwick," was

holden insufficient. How Berwick came to be part of the diocese of Durham, I have not yet learned.

As to writs of *mandamus*: In Trin. 9 Geo. I. a *mandamus* issued, to admit and swear four persons elected to be churchwardens of Berwick.

The act 11 Geo. I. c. 4. proceeds upon the ground "that a writ of *mandamus*, out of this court, lies to Berwick."

The last sort of writ, not ministerially directed, is a *certiorari*.

A *certiorari*, for a proper purpose, lies to any dominion of the crown of England. Mr. Justice Doderidge, in Sir John Carew's case, says, "the Register makes mention of a *certiorari* to remove a record taken at Calais (g)."

And there are precedents of such writs to Berwick directly. In Pasch. 3 Jac. 1. an indictment for a riot was removed from Berwick by *certiorari*; process issued upon it, out of this court, against the defendants to appear. In Michaelmas Term following the indictment was quashed, and the town clerk of Berwick amerced 5l. for not returning the caption.

In Trinity Vacation 1754, two indictments were removed from Berwick by *certiorari*. The defendants appeared in this court, and pleaded not guilty.

There is no instance of a doubt ever having been made, before the present case, concerning the authority of this court to send a writ of *certiorari* to Berwick; and we are all clearly of opinion, "that the court, by law, has such power."

Two great authorities are urged in opposition to this. They are no less than those of Sir Edward Coke and Lord Chief Justice Hale.

Sir Edward Coke, in Calvin's case (r), says, "that Berwick is no part of England, nor governed by the laws of England." And Lord Chief Justice Hale follows him, and says, "Berwick was sometimes parcel of Scotland, but was won by conquest by king Edward I. and after that lost by king Edward II. and afterwards regained by Edward III. It was governed by the laws of Scotland and their own particular customs, and not according to the rules of the law of England, further than as by custom it is there admitted. Yet now," says he, "by CHARTER they send burgeses to the parliament of England." In Calvin's case, there was no question concerning the constitution of Berwick. And we plainly see, by what has passed in the present case, how little was known, even at Berwick itself, concerning its own constitution. What was said about it in Calvin's case, was a mere *obiter* opinion, thrown out by way of argument and example. Sir

(g) V. Cro. Jac. 484.

(r) 7 Co. 23 b.

Edward Coke was very fond of multiplying precedents and authorities; and, in order to illustrate his subject, was apt, besides such authorities as were strictly applicable, to cite other cases which were not applicable to the particular question under his consideration. In the case then under judicial consideration, the question was, "whether Robert Calvin, the plaintiff, born in Scotland, after the descent of the crown of England to King James the First, was an alien born, and consequently disabled to bring any real or personal action, for any lands, within the realm of England." But it never was a doubt, "whether a person, born in the conquered dominions of a country, is subject to the king of the conquering country:" and therefore the argument did not hold from the case of Berwick, to the point then in question. Neither was the case of Calais in any sort apposite.

As to the laws by which Berwick is governed:

Whatever may be the case, when more particularly inquired into, with regard to their civil constitution, it appears very sufficiently, that in pleas of the crown, Berwick has no other laws by which it is governed but the laws of England. The statute 21 Geo. II. c. 19. for the more effectual securing the payment of rents and preventing fraud by tenants, supposes this. All the provisions of that act are extended to Berwick by name. Some of these provisions relate to ejectments, which concern civil matters; and they do proceed there by ejectment. But it is manifest that Coke is mistaken in saying, generally, "that Berwick was not governed by the laws of England." For in criminal matters, the fact is clearly otherwise.

And Lord Chief Justice Hale is clearly mistaken in saying, "that Berwick sends members to the parliament of England by charter." For it is by WRIT OF SUMMONS that they send them thither, in consequence of their being a borough. Chester, both county and city, first sent members to parliament, by virtue of an act made in Henry the VIIIth's time (1).

But though the court has power, by law, to send a writ of *certiorari* to Berwick, yet it ought not to issue in vain. And therefore we should be satisfied, that the end for which it is prayed, be attainable; and the ground sufficient for removing the record, in order to attain that end. The end here avowed is, that the matter may be tried in this court. And it is objected that there can be no such trial, because the trial must be local, and no jury can come from Berwick.

But the law is clear and uniform, as far back as it can be traced. Where the court has jurisdiction of the matter, if from any cause,

(1) 34 H. 8. c. 13.

it cannot be tried in the place, it shall be tried as near as may be. All local matters arising in Wales triable in this court, are by the common law tried by a jury of the next county in England (r). So as to the Cinque Ports, the *venire facias* shall be awarded *de vicineto* of the next vill, either in the county of Kent or Suffex (u). So as to the Isle of Ely (x). So as to Ireland (y); a *venire* was directed to the sheriff of Salop, as the next English county. So in parts of England itself, where an impartial trial cannot be had in the proper county, it shall be tried in the next.

This is the ancient and general rule, wherever the court has jurisdiction; and this general rule has often been applied to Berwick.

Edward the First, by an ordinance in parliament, extended these rules, as to complaints against the king of Scotland, that they might be tried in this court by a jury of Northumberland, or any other county, or before commissioners appointed by the king (z). There was a precedent applying this rule to Berwick, in 43 Eliz. affirmed upon a writ of error; and the like in 44 Eliz. The like the 20 Car. II. *Crispe and Jackson v. Mayor and Burgeſſes of Berwick* (a). And the Mayor of Berwick's case lays down as a certain principle, that where a local matter arising at Berwick is tried here, there is to be a suggestion made on the roll, "*breve demittit regis ibi non currit*," as it is in Wales.

There are two precedents in the reign of James II. of informations in this court for misdemeanors in Berwick; and in Michaelmas 8 Ann. the Attorney-General filed an information here, for misdemeanors in Berwick. In Hilary and Easter 1735, this court, after much litigation, granted informations for bribery in Berwick, at the election of their members to parliament, as being an offence and misdemeanor at the common law. Which shews Berwick, in respect of the jurisdiction of this court, "to proceed originally by information for misdemeanors committed there," to be upon the same foot as any other part of England. And the court never would have granted those informations without being satisfied "that they might be tried; because a defect of power to try, necessarily infers a want of jurisdiction.

There is not one authority to the contrary. And in reason it

(r) 19 H. 6. fo. 12. b. pl. 31.

(u) 2 Ro. Abr. tit. Trial, Letter I. pl. 6, 7. pa. 596, 597.

(x) *Howſe v. Biſhop of Ely*, Moore 88.

(y) 2 Ro. Abr. 597. pl. 3.

(z) 21 Ed. 1. Ryley's Placita Parl. 159.

(a) 1 Lev. 252. 1 Mod. 36, 37. 1 Sid. 381. 462. 1 Vent. 58. 90. Raym. 173. 1 Keb. 414. 676.

would

TOUCHING the islands of Jersey (*i*), Guernsey (*k*), Sark, and Alderney; they were anciently a part of the duchy of

(*i*) Jersey, or Gearsey, *olim* (*k*) Or Garnsey, *olim* Sarvia, *Cæsarea*. 4 Inst. 286. Blac. 4 Inst. 286. Com. 1 v. 106.

would be most absurd; because it would really be putting the place out of the protection of the law, and there must, in many important cases, be a total failure of trial, and consequently of justice.

Suppose the office of mayor should be usurped; the usurpation is a crime, and cannot be tried before the man himself who is accused, or any jurisdiction in the town. Much less could a question "whether the corporation was dissolved" be tried before themselves. Such questions could not be tried originally before commissioners sent thither by the king; they could only be judged in this court. To try franchises of this kind in any other shape, would not only be contrary to the common law, but to the act (*c*) abolishing the Star Chamber, and all the statutes there recited.

Suppose an action between the corporation and their own lessee to be depending at Berwick, or any suit instituted there between the corporation and any other person on a point of property, they could not judge in their own cause; and if it could not be tried elsewhere, there must be a failure of justice.

Every rule of the common law which holds in the case of Wales, concludes *a fortiori* to Berwick, both as to the jurisdiction of this court and the method of trial. Berwick is only a borough. It has neither *jura regalia* nor superior courts. Wales had both. A small part of the county of Durham is nearer to Berwick than Northumberland. But at the time of first sending process to the latter, the king's writ did not run to the former, being a county palatine. So that Northumberland was the nearest English county for the purpose of trial, as the king's writ did not run to Durham. The objection made when this matter first came on, appears now to be groundless, "that they proceeded by laws and usages of which this court cannot judge." Whereas their trials, as to criminal matters at least, are in the course of the common law, and entirely governed by the laws of England (*d*).

(*c*) 16, 17, Car. 1. c. 10.

De Laudibus, and note (*i*) on cap. xii.

(*d*) For ancient authorities as to the question in general, see Fortescue

of that work, ed. oct. 1775.

Normandy; and in that right, the kings of England held them till the time of king John. But although king John, as is before shewn, was unjustly deprived of that duchy, yet he kept the islands; and when, after that, they were by force taken from him, he by the like force regained them: and they have ever since continued in the possession of the crown of England [E].

As to their laws, they are not governed by the laws of England, but by the laws and customs of Normandy; but not as they are at this day: for since the actual division and separation of those islands from that duchy, there have been several new edicts and laws made by the kings of France, which have much altered the old law of Normandy: which edicts and laws bind not in those islands, they having been ever since king John's time at least, under the actual allegiance of England.

AND hence it is, that though there be late collections of the laws and customs of Normandy, as Terrier and some others, yet they are not of any authority in those islands, for the decision of controversies; as the *Grand Coutumier*

[E] KING JOHN constituted—12 coronatores ad placita et jura coronæ conservanda, et concessit quod ballivus per visum coronator' placitare sine brevi poterit de assisa novæ disseisinæ, de morte antecessor', et de dote, infra annum. 4 Inst. §86. App. H. Jer. N. 1.

The 12 coroners are elected by the country upon death, and sworn, and ought with the justices, or (if they are absent) by themselves, judicare de omnibus casibus in insulâ emergent', (exceptis nimis arduis, as high treason, &c.) amerciamenta, taxare, &c.

Placitum in insula coram aliquibus just' inceptum non debet extra insulam adjournari.

Nullus de tenemento quod per annum et diem quiete tenuit, sine brevi de cancel' respondere teneatur.

Nullus debet imprisonari in castro, nisi in causâ criminali, et hoc per judicium coronator' jurat.

of Normandy (*l*) is : which is, at least in the greatest part thereof, a collection of the laws of Normandy, as they stood before the disjoining of those islands from the duchy ; viz. before the time of king Henry III. though there be in that collection some edicts of the kings of France which were made after that disjunction. And those laws, as I have shewn before, though in some things they agree with the laws of England, yet in many things they differ, and in some are absolutely repugnant.

AND hence it is, that regularly, suits arising in those islands are NOT to be tried, or determined, in the king's courts in England ; but are to be heard, tried, and determined in those islands ;—either before the ordinary courts of jurats there, or by the justices itinerant there (*m*), commissioned under the great seal of England to determine matters there arising. The reason is, because their course of proceedings, and their laws, differ from the course of proceedings and the laws of England.

AND although it be true, that in ancient times, since the loss of Normandy, some scattering instances are, of pleas moved here, touching things done in those islands ; yet the general settled rule has been, to remit them to those islands, to be tried and determined there by their law. Though at this day, the courts at Westminster hold plea of all TRANSITORY actions, wheresoever they arise ; for it cannot appear upon the record where they did arise.

(*l*) An ancient book of great authority.

(*m*) All causes are originally

determined by their own officers, the bailiffs and jurats of the islands.

MIC. 42 E. 2. Rot. 45. *coram rege*. A great complaint was made by petition, against the deputy governor of those islands, for divers oppressions and wrongs done there. This petition was, by the chancellor, delivered into the court of B. R. to proceed upon it; whereupon there were pleadings on both sides. But because it appeared to be for things done and transacted in the said islands, judgment was thus given: "Et quia negotium prædict' in curia hic terminari non potest, eo quod juratores insulæ prædict' coram iustitiariis hic venire non possunt, nec de jure debent, nec aliqua negotia infra insula prædicta emergentia terminari non debent nisi secundum consuet. insulæ prædictæ: Ideo recordum retro traditur cancellario ut inde fiat commissio domini regis ad negotia prædicta in insula prædicta audienda & terminanda secundum consuet' insulæ prædictæ."

AND accordingly 14 Junii, 1565, upon a report from the attorney-general, and advice with the two chief justices, a general direction was given by the queen and her council, —that all suits between the islanders, or wherein one party was an islander, for matters arising within the islands, should be THERE heard and determined (n).

BUT still this is to be taken with this distinction and limitation; viz. that where the suit is immediately for the king, there the king may make his suit in any of the courts HERE, especially in the court of king's bench. For

(n) The king's writ, or process, from the courts of Westminster—(*brevia mandatoria excepta*) is there of no force;

but his commission is.—They are not bound by common acts of our parliament, unless particularly named. 4 Inst. 286.

instance,

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instance, in a *quare impedit* brought by the king in *B. R.* HERE, for a church IN those islands. So in a *quo warranto* for liberties there. So a demand of redemption of lands sold by the king's tenant within a year and a day, according to the custom of Normandy. So in an information for a riot; or grand contempt against a governor deputed by the king. These, and the like suits, have been maintained by the king in his court of king's bench HERE, though for matters arising WITHIN those islands. This appears *Pascha* 16 Edw. II. *coram rege*, Rot. 82. Mich. 18. Edw. II. Rot. 123, 124, 125. & *Pas.* 1 E. III. Rot. 59.

AND for the same reason it is, that a writ of *habeas corpus* lies into those islands, for one imprisoned there: for THE KING MAY DEMAND, AND MUST HAVE AN ACCOUNT OF THE CAUSE OF ANY OF HIS SUBJECTS LOSS OF LIBERTY: and therefore a return MUST be made of this writ, to give the court an account of the cause of imprisonment; for no liberty, whether of a county palatine, or other, holds place against those *brevia mandatoria*: as that great instance of punishing the bishop of Durham, for refusing to execute a writ of *habeas corpus* out of the king's bench, 33 Edw. I. makes evident.

AND as pleas arising in the islands regularly, ought NOT, in the first instance, to be deduced into the courts here, except in the king's case; so neither ought they to be deduced into the king's courts HERE, in the SECOND instance. And therefore, if a sentence or judgment be given in the islands, the party grieved thereby may have his appeal TO THE KING AND HIS COUNCIL, to reverse the same if there
be

be cause (o). And this was the course of relief in the duchy of Normandy, viz. by appeal to the duke and his council. And in the same manner, it is still observed in the case of erroneous decrees or sentences in those islands, viz. to appeal to the king and his council.

BUT the errors in such decrees or sentences are not examined by writ of error in the king's bench, for these reasons :

FIRST, because the courts there, and those here, go not by the SAME rule, method, or order of law.

AND secondly, because those islands, though they are parcel of the dominion of the crown of England, yet they are not parcel of the realm of England, nor indeed ever were (p) ; but were anciently parcel of the duchy of Normandy ; and are those remains thereof, which the power of the crown and kingdom of France have not been able to wrest from the kings of England (q).

(o) For, if an erroneous judgment be given there, a writ of error lies not here. Jenk. 199. pl. 15. who cites 2 E. III. 25. 11 H. VI. 5. Jenkins, after his report of the case, adds—"By all the judges of England, and the king's counsel."

"Nil temere novandum.

"Fiat quod prius fieri consuevit."

(p) In Calvin's case, 7 Co. 21. a. it is said, that these islands are not parcel of the realm of England. It seems that they were not so originally. Cont. Seld. de Ma. Cl. 4 v. 1351. Acc. App. H. Jer. 440.

(q) As to our colonies, or plantations, the student may consult the first volume of Blackstone's Commentaries, and Mr. Lind's "Remarks on the principal Acts of the thirteenth Parliament of Great Britain"—an ingenious performance, though the principles are somewhat novel. On the other hand, see Mr. Burke's Speech of the 19th of April 1774, and that of the 22d of March 1775. Since which period, namely, on the 13th of November 1783, his Majesty acknowledged the former colonies of New Hampshire, Massachusetts Bay, Rhode Island, and Providence

dence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent States, and treated with them as such. They are called the United States of America. See Ann. Reg. for 1782, and Stat. 22 Geo. III. c. 48. For the history of that important revolution, see Ann. Reg. from 1774 to 1783. As to any foreign dominions which may belong to the person of the king by

hereditary descent—by purchase, or other acquisition, as the territory of Hanover, and his Majesty's other property in Germany—suffice it to remark, that such dominions do not in any wise appertain to the crown of these kingdoms;—they are therefore entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. See the act of settlement, 12 & 13 W. III. c. 3. and Blac. Com. 1 v. 109.

CHAP. X.

Concerning the communication of the laws of England unto the kingdom of Scotland.

BECAUSE this inquiry will be of use, not only in itself, but also as a parallel discovery of the transmission of the English laws into Scotland, as before is shewn they were into Normandy, I shall in this chapter pursue and solve their several queries, viz.

FIRST, what laws of Scotland hold a congruity and suitableness with those of England.

SECONDLY, whether these be a sufficient ground for us to suppose, that that similitude or congruity began with a conformation of **THEIR** laws to those of England. And,

THIRDLY, what might be reasonably judged to be the **MEANS**, or **REASON**, of the conformation of their laws unto the laws of England.

As to the first of these inquiries. It is plain, beyond all contradiction, that many of the laws of Scotland hold a congruity and similitude, and **MANY** of them a **PERFECT IDENTITY**, with the laws of England; at least as the English laws stood in the times of Henry II. Richard I. king John, Henry III. and Edward I. And although in Scotland, use hath always been made of the **CIVIL LAW**, in point of direction,

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direction, or guidance, where their municipal laws, either customary or parliamentary, failed; yet, as to their particular municipal laws, we shall find a RESEMBLANCE, PARITY, AND IDENTITY, in their laws with the laws of England, anciently in use (a). We need go no further for evidence hereof, than the *Regiam Majestatem* (b), a book published by Mr. Sken in Scotland. It would be too long to instance in all the points that might be produced; and therefore I shall single out some few, remitting the reader for his further satisfaction to the book itself [A].

DOWER

(a) The law of Scotland (says Barrington) agreed anciently not only with the principles of the law of England, but in its practice, tho' there might be some variances—of no great importance. Obsl. on Stat. 111. Blackstone admits "a great resemblance;"—yet he seems to question "an identity" in their laws, on the accession of James the Sixth to the crown of Eng-

land. Com. 1 v. 95.

(b) The book is so called, because (according to Sir Edward Coke) "it beginneth (as Justinian's Institutes do) with these words—*Regiam Majestatem*."—4 Inst. 345. The Institutes of Justinian begin—"de usu armorum et legum"—and then proceed, *IMPERATORIAM Majestatem non solum ARMIS DECORATAM*, &c.

[A] It is well known, says Mr. Barrington, that the preface and introduction to the *Regiam Majestatem*, as well as many other parts of that ancient book of the Scotch law, are the same with our Glanvil: and though formerly there were wars and great animosities between the two nations, yet, from their vicinity, there was, to a certain degree, a communication of customs and manners. The learned Craig supposes, that the English law is, in some particulars, the foundation of that of Scotland, and that the *Regiam Majestatem* is a mere transcript from our Glanvil; other writers upon the Scotch law, particularly Bruce (a), have

(a) "Non prætereundum, virum clarissimum (sc. Craigium) (quod in epistola nuncupatoria, et sexcentis alijs in locis aperte professus est) dum regnorum Scotiæ et Angliæ adunationi velificatur, eum in finem probare adnuitur, maximam inter se asinitatem habere utriusque gentis

"jura, in eo præcipue operam posuisse suam, ut ab Anglorum principum placitis, istiusque gentis consuetudinibus, mores patrios haud minimâ ex parte defluxisse demonstraret. Sed quid (malum) nobis cum antiquis invisiisque hostibus." Bruce's Princip. Jur. Feud. Edinb. 1713. in scopo.

denied

DOWER of the wife, to be the THIRD part of her husband's lands of inheritance; the writ to recover the same; the

denied this, asserting that the English is derived from the Scotch: be this as it may, the very point in litigation necessarily supposes an agreement and connection.

As for the opinion of English writers upon this head, (continues Mr. Barrington) I have not happened to meet with one, who seems ever to have looked into the Scotch law any further than to have compared Glanvil and the *Regiam Majestatem* (b); it is also very particular, that even in Calvin's case (c), when the judges might have paid their court so well to James the First, by shewing an affinity between the two laws, there is not even an allusion to such an agreement. This is the more extraordinary, as this king, in one of his speeches to the parliament, says, "all the law of Scotland for tenures, wards, liveries, and feignories, is drawn from England; and James the First of Scotland, being educated in England, brought the English laws in a written hand (d)."

The *Regiam Majestatem*, though in most particulars the same with Glanvil, is considered as authentic by Sir Edward Coke, and by most of the writers upon the Scotch law, except Craig, whose opinion Macdoul strongly combats. By a Scotch statute of the year 1425, "it is statute and ordained, that six wise men, and discreet (quhilk knawes the lawes best) shall be chosen to see and examine the buikes of the lawe, that is to saye, *Regiam Majestatem et Quoniam Attachiamenta*, and mende the lawes that neids mendment." These books therefore were at that time considered as the very foundation of the Scotch law, which a sort of transcript from the law of another nation could not have been allowed to be, by the Scotch parliament (e).

Sir Edward Coke, observing the many circumstances in which the two nations agreed, supposes the common law of each to have been originally the same; especially as the *Regiam Majestatem*, which contains the rules of the ancient common law of Scotland, in substance agrees with Glanvil, whose book contains the principles of our common law, as it stood in the time of Henry the Second.—

(b) See Lord Bacon, vol. 2. White-
lock's Comm. on the Parl. Writ, vol.
2. p. 272. Reliq. Spelm. p. 72.
& Inst. cap. 75.

(c) 7 Cok. Rep. p. 1.

(d) Bar. pref. 5. on Stat. 3.

(e) Bar. on Stat. 17.

the means of forfeiting themselves by treason or felony of the husband, or adultery of the wife; are in great measure

"The book (says Coke) doth in substance agree with our Glanvil, and most commonly *de verbo in verbum*, and many times our Glanvil is cited therein by special name. But by reason of their acts of parliament, which in many points have altered, diminished, and abrogated many of the old, and made new laws and other proceedings, the distinct kingdoms as they now stand have many different laws (f)." Mr. Justice Blackstone, pursuing the same idea, remarks, that "the many diversities subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments (g)."

Sir Edward Coke recommends it to those who are desirous of knowing "such *miscellanea* as he has observed concerning Scotland, to read the records and authorities following."

The records of parliament from the beginning thereof, for the receivers and tryers of petitions in the lords house. Rot. liberat. anno 3 Ed. 1. m. 2. per Johannem Lovetot. Rot. paten. anno 10 Ed. 1. Gilberto comiti Gloverniz et Hereford. Scotia, Rot. parliament. 21 Ed. 1. inter placita Rot. 1. and 2. Hovenden, 1194. p. 7. Carta regis R. 1. Mat. Westm. anno Dom. 1260. p. 308. H. 3. Rot. Scotiz 21. Ed. 1. Carta E. 1. et literæ Alexand. regis Scotiz. Rot. Vasconiz 25 E. 1. m. 2, 3. in dorf. Trin. 25 E. 1. coram rege Rot. 6. Norff. Rafe de Tonyes case. Anno 29. E. 1. literæ quas rex per se et quas comites et barones Angliæ per se miserunt domino papæ anno 29 E. 1. autoritate parliamenti, qua irrotulata sunt etiam in Scaccario (b). Vide Walsingham, 48 and 49.

Rot. pat. 24 E. 1. Episcopis Scotiz, Mich. 33 E. 1. coram rege Rot. 127. Scotia, Rot. parl. 35. E. 1. in brevi de parlamento, et auter 1 E. 2. 1 E. 3. fo. 17. Graye's case. 6 E. 3. 18. The Abbot of Crowland's case. 9 E. 3. 6. John Darcey's case. Rot. pat. 10 E. 3. 2 pars. Comes Arundel. Rot. parl. 14 E. 3. nu. 15. stat. 4. Rot. claus. 22 E. 3. et 23 E. 3. breve de parlamento magnifico principi, &c. 22 Aff. p. 85. 39 E. 3. fo. 35. Rot. parliament. 41 E. 3. nu. 7. 42 E. 3. fo. 25. 8 R. 2. tit. Cont. clayme. p. 8. ultimo. 33 H. 4. fo. 5. Rot. pat. 2 H. 5. part 3. m. 1. 8 H. 5. fo. 5. 32 H. 6. 25. 20 E. 4. 6. b. Litt. sect. 100 and 163. 1 Part of the Institutes. Stat.

(f) 4 Inst. 345, 346.

(g) Com. 1v. 95.

(b) Rot. Parl. apud Linc, 29 E. 1.

An. Dom. 1300. Literæ omnium nobilium Angliæ, &c. Papæ.

conformable to the laws of England. *Vide Regiam Majestatem*, lib. 2. cap. 16, 17. and *Quoniam Attachiamus* (c), cap. 85.

THE exclusion of the descent to the ELDER brother, by his receiving homage; which, though now antiquated in England, was anciently received here for law; as appears by Glanville, lib. 7. cap. 1. and *vide Regiam Majestatem*, lib. 2. cap. 22.

THE exclusion of daughters from inheritances, by a son. The descent to all the daughters in coparcenary, for want of sons. The chief house allotted to the eldest daughter upon this partition. The descent to the collateral heirs, for want of lineal, &c. Ibid. cap. 24, 25, 26, 27, 28, 33, 34. But this is now altered in some things per Stat. Rob. cap. 3.

THE full ages of males 21, of females 14, to be out of ward in socage 16. Ibid. cap. 42.

(c) This book, which is an *mento*, "because (says Sir Edward Coke) it beginneth with those two words." 4 Inst. 345.

de 1. and 2. R. 6. cap. 36. Fortescue cap. 13. Pl. Com. 116. Dier manuscript 3 Eliz. 22. b. and 13 Eliz. fo. 68. m. 5. Dier 12 Eliz. fo. 187. in print. Lib. 7. fo. 21, 23, &c. Calvin's case. Lib. 9. fo. 114. Seigneur Zaucher's case. 4 Inst. in the chapter of the High Court of Parliament. Polydor. Vergil. Hollinsh. 2 part. fo. 116, 117. 2 part. 386. Stowe 303. Math. Westm. 425, 428, 443, Walsingham 17, 18, 31, 129, &c.

Those who are desirous of gratifying a minute inquiry into the municipal laws of Scotland, may consult Mr. Wallace's System of the Principles of the Laws of that Country, a work of uncommon labour and research.

THAT

THAT the custody of idiots belonged to the king. *Ibid.* cap. 46.

THE custody of heirs in socage belong to the next of kin, to whom the inheritance can't descend. *Vide Regiam Majestatem*, cap. 47.

THAT son born before marriage, or *bastard signis*, not to be legitimate by the marriage after; nor was he hereditary by the ancient laws of Scotland, though afterwards altered in use, as it seems. *Regiam Majestatem*, cap. 51.

THE confiscation of *bona usurariorum*, after their death, conform to the old law here used. *Ibid.* cap. 54, though now antiquated.

THE laws of escheats, for want of heirs, or upon attainder. *Ibid.* cap. 55.

THE acquittal of lands given in frank-marriage, till the fourth degree be past. *Ibid.* cap. 57.

HOMAGE, the manner of making it with the persons, by, or to whom, as in England. *Ibid.* cap. 61, 62, 63, &c.

THE relief of an heir in knight's service, of full age. *Regiam Majestatem*, cap. 17.

THE preference of the sister of the WHOLE blood, before the sister of the HALF blood. *Quoniam Attachamento*, cap. 89.

THE single value of the marriage, and forfeiture of the double value, precisely agree with the statute of Marbridge. *Ibid.* cap. 91.

THE forfeiture of the lord's disparaging his ward in marriage, agrees with *Magna Charta*, and the statute of Marlbridge. *Quoniam Attachimento*, cap. 92.

THE preference of the lord, by priority, to the custody of the ward. *Ibid.* cap. 95.

THE punishment of the ravisher of a ward, by two years imprisonment, &c. as here. *Ibid.* cap. 90.

THE jurisdiction of the lord in *Infangthref*. *Ibid.* cap. 100.

Goods, confiscats, and deadends, as here. *Liber De Modo tenendi Cur. Baron.* cap. 62, 63, 64.

AND the like of waifs. *Ibid.* cap. 65.

WIDOWS not to marry without the consent of the lord; *Statute. Meis.* 2. cap. 23.

WRECK of the sea defined precisely as in the stat. *Westm.* 2. *Vide Ibid.* cap. 25.

THE division of the deceased's goods,—one third to the wife, another third to the children, and another to the executor, &c. conformable to the ANCIENT law of England, and the custom of the North to this day. *Lib.* 2. cap. 37.

ALSO the proceedings to recover possessions by *mortd'ancestor*, *juris utrum*, *affixe de novel disseisin*, &c. the writs and process are much the same with those in England, and

and are directed according to Glanville, and the old statutes in the time of Edward I. and Henry III. *Vide Regiam Majestatem*. lib. 3. cap. 27 to 36.

MANY more instances might be given, of many of the municipal laws of Scotland, either precisely the same with those in England, or very near, and like to them (*d*): tho' it is true, they have some particular laws, that hold not that conformity to ours, which were introduced either by particular, or common customs, or by acts of their parliaments. But, by what has been said and instanced in, it appears, that like as between the laws of England and Normandy, so also between the laws of England and Scotland, there WAS ANCIENTLY a great similitude and likeness,

I COME therefore to the second thing I proposed to enquire into, viz.—What evidence there is, that those laws of Scotland were either *desumed* from the English laws; or, from England, transmitted thither in such a manner, as that the laws HERE in England, were, as it were, THE ORIGINAL OR PRIME EXEMPLAR, out of which those parallel, or similar laws of Scotland were copied or trans-

(*d*) It seems from the *Regiam Majestatem*, that the trial by jury was, in civil matters, used in Scotland so early as David I. who began to reign in 1124.—“When the twelve royal men compeer and pass upon the assize, they shall proceed and try quhilk of the parties, the persewer or the defendant, hath best right to the lands claimed.”—This is cited from Skene's translation of the *Regiam Majestatem*. But see *Reg. Maj.* l. 1. c. 12. 13. 14. l. 2. c. 19. 33. 43. *Chron. Mail-ros*, 176. The use of juries in civil causes, except in the court of Exchequer, hath been long discontinued in Scotland. Perhaps the revival of that inestimable mode of trial might contribute something to the public felicity of the country: and a parliamentary revision of the *criminat* law of Scotland would no doubt add to those benefits which the Union communicated,

cribed, into the body of their laws: And this appears evident on the following reasons, viz.

FIRST, for that Glanville, which, as has been observed, is the ancientest collection we have of English laws (*c*), seems to be even transcribed, in many entire copies of the laws above-mentioned; and in some others, where Glanville doubts, that book doubts: and where Glanville follows the practice of the laws then in use, though altered in succeeding times, at least after the reign of Edward I. there the *Regiam Majestatem* does accordingly. For instance, viz.

GLANVILLE, lib. 7. cap. 1. determines that a man can't give away part of the lands which he held by hereditary descent unto his bastard, WITHOUT THE CONSENT OF HIS HEIR; and that he may not give ALL his purchases from his eldest son. This is also declared to be the law of Scotland accordingly, *Regiam Majestatem*, lib. 2. cap. 19, 20. Though since Glanville's time the law has been altered in England.

Also Glanville, lib. 7. cap. 1. makes a great doubt, whether the second son being enfeoffed by the father, and dying without issue, the land shall return to the father, or descend to his eldest, or to his youngest brother; and at last, gives such a decision, as we find almost in the same terms and words recited in the question and decisions laid down in *Regiam Majestatem*, lib. 2. cap. 22.

AGAIN, Glanville, lib. 7. cap. 1. makes it a difficult question in his time, whether the eldest son dying in the

(*c*) Vide note [M] on ch. 1.

life-time of his father, HAVING ISSUE, the nephew or the youngest son shall inherit; and gives the arguments *pro et contra*. *Regiam Majestatem*, cap. 33. seems to be even a transcript thereof out of Glanville.

AND further, the tract concerning assizes, and the time of limitation, the very form of the writs, and the method of the process, and the directions touching their proceedings, are but transcripts of Glanville; as appears by comparing *Regiam Majestatem*, lib. 3. cap. 36. with Glanville lib. 13. cap. 32. And the collector of those laws of Scotland, in all the before-mentioned places, and divers others, quotes Glanville as the PATTERN at least of those laws.

BUT secondly, a second evidence is, because many of the laws which are mentioned in the *Regiam Majestatem*, *Quoniam Attachiamiento*, and other collections of the Scottish laws, are in truth VERY TRANSLATIONS of several statutes made in England in the times of king Henry III. and king Edward I. For instance; the statute of their king Robert II. cap. 1. touching alienations to religious men, is nothing else but an enacting of the statute of Mortmain, 13 Edw. I. cap. 13. The law above-mentioned, touching the disparagement of wards, is defumed out of *Magna Charta*, cap. 6. and the statute of Merton, cap. 6. So the law abovesaid, against ravishers of wards, is taken out of Westm. 2. cap. 35. So the said law of the double value of marriage is taken out of Westm. 1. cap. 22. The law concerning wreck of the sea, is but a transcript out of Westm. 1. cap. 4. Divers other instances of like nature might be given, whereby it may appear, that very many of those laws in Scotland, which are a part of their *corpus juris*, bear a similitude to the laws of England, and were taken, as it were, out of those common or statute laws here, that obtained in the time of Edward I. and before; but

especially such as were in use or enacted in the time of Edward I. And the laws of England, relative to those matters, were, as it were, the original and exemplar, from whence those similar, or parallel, laws of Scotland were derived or borrowed.

THIRDLY, I come now to consider the third particular, viz. by what means, or by what reason, this similitude of laws in England and Scotland happened; or upon what account, or how the laws of England, at least in many particulars, or *capita legum*, came to be communicated unto Scotland. And they seem to be principally these two, viz. first, the VICINITY of that kingdom to this: and secondly, the SUBJECTION of that kingdom unto the kings of England, at least for some considerable time.

TOUCHING the former of these; first, it is very well known, that England and Scotland made but ONE ISLAND (f), divided not by the sea, or any considerable arm thereof, but only by the interjacency of the river Tweed, and some desert ground, which did not hinder any easy, common access of the people of the one kingdom to the other. By this means, first, the intercourse of commerce between that kingdom and this, was very frequent and usual, especially in the northern counties; and this intercourse of commerce brought unto those of Scotland an acquaintance and familiarity with our English laws and customs, which in process of time were adopted and received gradually into Scotland (g).

AGAIN,

(f) By the 1 Jac. 1. cap. 1, it is declared, that these two mighty, famous, and ancient kingdoms were formerly one.

(g) A remarkable proof of the LITTLE intercourse between the English and the Scots, before the union of the crowns in the per-

son

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AGAIN, secondly, this vicinity gave often opportunities of transplanting of persons of either nation into the other; especially in those northern parts. And thereby the English transplanted and carried with them the use of their native customs of England; and the Scots, transplanted hither, became acquainted with our customs, which by occasional remigrations were gradually translated, and became diffused and planted in Scotland. And it is well known, that, upon this account, some of the nobility and great men of Scotland had possessions HERE as well as there. The earls of Angus were not only noblemen of Scotland, but were also barons of parliament HERE, and sat in our English parliaments; as appears by the summons to parliament, *tempore Edwardi tertii*.

AGAIN, thirdly, the kings of Scotland had FEODAL possessions HERE. For instance, the counties of Cumberland, Northumberland, and Westmoreland, were anciently held of the crown of England by the kings of Scotland, attended with several vicissitudes and changes, until the feast of St. Michael 1237; at which time, Alexander king of Scotland finally released his pretensions thereunto; as appears

son of James I. is to be found in two curious papers, one published by Haynes, the other by Strype. In the year 1567, Elizabeth commanded the bishop of London to take a survey of all the strangers within the cities of London and Westminster.—By his report, which is very minute, it appears, that the whole number of Scots, at that time, was only FIFTY-EIGHT. Haynes 455.—A survey of the same kind was made

by Sir T. Row, Lord Mayor, A. D. 1568.—The number of Scots had then increased to EIGHTY-EIGHT.—Strype 4.—On the accession of James, a considerable number of Scots, especially of the higher rank, resorted to England; but it was not till the Union that the intercourse between the two kingdoms became great. Robert. Hist. Scot. v. 2. pa. 304.

by

by the deed thereof, entered into the Red Book of the Exchequer, and the Parliament Book of 20 Edw. I. In consideration thereof, Henry III. gave him the lands of Penrith and Sourby, *habend' sibi heredibus suis regibus Scotiae*; and, by virtue of that special limitation, they came to John the eldest son of the eldest daughter of Alexander king of Scotland, together with that kingdom. But the land of Tindale, and the manor of Huntingdon, which were likewise given to him and his heirs, but without that special limitation, *REGIBUS SCOTIAE*, fell in coparcenary; one moiety thereof to the said John king of Scotland, as the issue of the eldest daughter, and the other moiety to Hastings, who was descended from the younger daughter of the said Alexander. Those possessions came again to the crown of England by the forfeiture of king John of Scotland; who, through the favour of the king of England, had restitution of the kingdom of Scotland, yet never had restitution of those possessions he had in England, and forfeited and lost by his levying war against the kingdom of England, as aforesaid.

AND thus I have shewn, that the vicinity of the kingdoms of England and Scotland, and the consequence thereof, viz. translations of persons and families, intercourse of trade and commerce, and possessions obtained by the natives of each kingdom in the other, might be one means for communicating OUR LAWS to them,

BUT secondly, there was another means far more effectual for that end, viz. the superiority and interest that the kings of England obtained over the crown and kingdom of Scotland; whereby it is no wonder that many of our English laws

laws were transplanted thither, by the power of the English kings. This interest, dominion, or superiority of the kings of England in the realm of Scotland, may be considered these two ways, viz. first, how it stood antecedently to the reign of king Edward I.; and secondly, how it stood in his time,

TOUCHING the former of these, I shall not trouble myself with collecting arguments or authorities relating thereto. He that desires to see the whole story thereof, let him consult Walsingham, *sub anno* 18 Edward I. as also Rot. Parl. 12 R. II. *pars secunda*, N^o 3. Rot. Claus. 29 E. I. m. 10. dorso, and the letter of the nobility to the pope asserting it. Ibid.

AND this might be one means, whereby the laws of England, in elder times, might in some measure be introduced into Scotland.

BUT I rather come to the times of king Edward I. who was certainly THE GREATEST REFINER of the English laws, and studiously endeavoured to enlarge the dominions of the crown of England, and to extend and propagate the laws of England into all parts subject to his dominion. This prince, besides the ancient claim he made to the superiority of the crown of England over that of Scotland, did for many years ACTUALLY ENJOY that superiority in its full extent. The occasion and progress thereof was thus, as it is related by Walsingham, and consonantly to him, appears by the records of those times; viz. King Edward I. having formerly received the homage and fealty of Alexander king of Scots, as appears Rot. Claus. 5 E. I. m. 5.

m. 5. dorso, was taken to be *superior dominus Scotia regni* [B].

ALEX-

[B] The homage usually paid by the kings of Scotland was not for their crown, but for some other territory. It is probable that the homage was performed in general terms without any particular specification of territory; and this inaccuracy had proceeded either from some dispute between the two kings about the territory and some opposite claims, which were compromised by the general homage, or from the simplicity of the age, which employed few words in every transaction. To prove this, we need but look into the letter of king Richard, where he resigns the homage of Scotland, reserving the usual homage. His words are, "Sæpe dictus W. rex ligeus homo noster deveniat de omnibus terris de quibus antecessores sui antecessorum nostrorum ligei homines fuerunt, et nobis atque hæredibus nostris fidelitatem jurarunt (a)." These general terms were probably copied from the usual form of the homage & self.

It is no proof that the kings of Scotland possessed no lands nor baronies in England, because we cannot find them in the imperfect histories and records of that age. For instance, it appears clearly from another passage of this very letter of Richard, that the Scottish king had lands both in the county of Huntingdon and elsewhere in England; though the earldom of Huntingdon itself was then in the person of his brother, David; and we know at present of no other baronies which William held. It cannot be expected that we should now be able to specify all his fees which he either possessed or claimed in England, when it is probable that the two monarchs themselves and their ministers would at that very time have differed in the list: the Scottish king might possess some, to which his right was disputed; he might claim others, which he did not possess; and neither of the kings was willing to resign his pretensions by a particular enumeration.

A late author (Mr. Carte) has taken advantage of the undefined terms of the Scots homage, and has pretended that it was done for Lothian and Galloway, that is, all the territories of the country now called Scotland lying south of the Clyde and Forth. But, to refute this pretension at once, we need only consider, that if those territories were held in fee of the English kings, there would, by the nature of the feudal law, as established in England, have been continual appeals from them to the courts of the lord paramount;

(a) Rymer vol. 1. p. 65.

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ALEXANDER dying, left Margaret, his only daughter ; and she dying without issue, about 18 E. I. there fell a controversy

contrary to all the histories and records of that age. We find, that as soon as Edward really established his superiority, appeals immediately commenced from all parts of Scotland ; and that king, in his writ to the king's-bench, considers them as a necessary consequence of the feudal tenure. Such large territories also would have supplied a considerable part of the English armies, which never could have escaped all the historians : not to mention that there is not any instance of a Scots prisoner of war being tried as a rebel, in the many hostilities between the kingdoms, where the Scots armies were chiefly filled from the southern counties.

Mr. Carte's notion with regard to Galloway, which comprehends in the language of that age, or rather in that of the preceding, most of the south-west counties of Scotland, rests on so slight a foundation, that it scarce merits being refuted. He will have it (and merely because he will have it) that the Cumberland yielded by king Edmund to Malcolm I. meant not only the county in England of that name, but all the territory northwards to the Clyde. But the case of Lothian deserves more consideration.

It is certain, that, in very ancient language, Scotland means only the country north of the Firths of Clyde and Forth. The southern country was divided into Galloway and Lothian ; and the latter comprehended all the south-east counties. This territory was certainly a part of the ancient kingdom of Northumberland, and was entirely peopled by Saxons, who afterwards received a great mixture of Danes among them. It appears from all the English histories, that the whole kingdom of Northumberland paid very little obedience to the Saxon monarchs, who governed after the dissolution of the Heptarchy ; and the northern and remote parts of it seem to have fallen into a kind of anarchy, sometimes pillaged by the Danes, and sometimes concurring with them in their ravages upon other parts of England. The kings of Scotland, lying nearer them, took at last possession of their country, which had scarce any government ; and we are told by Matthew of Westminster, p. 193, that king Edgar made a grant of the territory to Kenneth III. that is, he resigned claims which he could not make effectual without bestowing on them more trouble and expence than they were worth ; for these are the only grants of provinces made by kings ; and so ambitious and active a prince as Edgar would never have given presents of any other kind. Though Matthew of Westminster's authority may appear small with regard to so remote a transaction ;

yet

troverſy touching the ſucceſſion of the crown of Scotland, between the king of Norway, claiming AS TENANT BY

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yet we may admit it in this caſe, becauſe Ordericus Vitalis, a very good authority, tells us, p. 701. that Malcolm acknowledged to William Rufus, that the Conqueror had confirmed to him the former grant of Lothian. But it follows not, becauſe Edgar made this ſpecies of grant to Kenneth, that therefore he exacted homage for that territory. Homage and all the rites of the feudal law were very little known to the Saxons; and we may alſo ſuppoſe, that the claim of Edgar was ſo antiquated and weak, that, in reſigning it, he made no very valuable conceſſion; and Kenneth might well reſuſe to hold, by ſo precarious a tenure, a territory which he at preſent held by the ſword. In ſhort, no author ſays he did homage for it.

The only colour indeed of authority for Mr. Carte's ſecond ſon, that Matthew Paris, who wrote in the reign of Henry III. before Edward's claim of ſuperiority was heard of, ſays, that Alexander III. did homage to Henry III. *pro Laudiano et aliis terris* (b). This word ſeems naturally to be interpreted Lothian. But in the firſt place, Matthew Paris's teſtimony, though conſiderable, will not outweigh that of all the other hiſtorians, who ſay that the Scots homage was always done for lands in England. Secondly, if the Scots homage was done in general terms (as has been already proved), it is no wonder that hiſtorians ſhould differ in their account of the object of it, ſince the parties themſelves were not fully agreed. Thirdly, there is reaſon to think that *Laudianum* in Matthew Paris does not mean Lothian in Scotland. There appears to have been a territory which anciently bore that or a ſimilar name, in the North of England. For (1) the Saxon Chronicle, p. 197. ſays that Malcolm Kenmure met William Rufus in *Lodene* in England. (2) It is agreed by all the hiſtorians, that Henry II. only reconquered from Scotland the northern counties of Northumberland, Cumberland and Weſtmoreland. See Newbriggs, p. 383. Wykes, p. 30. Hemingford, p. 492. Yet the ſame country is called by other hiſtorians *Loidis*, *cemitatu Lodonenſis*, or ſome ſuch name. See M. Paris, p. 68. M. Weſt. p. 247. Annal. Waverl. p. 159. and Diceto, p. 531. (3) This laſt mentioned author, when he ſpeaks of Lothian in Scotland, calls it *Lobeneis*, p. 574. though he had called the Engliſh territory *Loidis*. (4) King David's charter to the church of Durham begins with this paſſage: "Omnibus Scotis et Angliis tam in Scotia quam in *Lodonenſis* con-

(b) M. Par. 555.

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THE CURTESY, Robert de Bruce descended from the younger daughter of David king of Scots, and John de Baliol descended from the elder daughter, with divers other competitors.

ALL the competitors submit their claim to the decision of Edward I. king of England, as **SUPERIOR DOMINVS REGNI SCOTIÆ**; who thereupon pronounced his sentence for John de Baliol, and accordingly put him in possession of the kingdom, and required and received his homage.

THE king of England, notwithstanding this, kept still the possession **ET INSONIA** of his superiority. His court of king's bench sat actually at Roxborough in Scotland, Mich. 20, 21 Edward I. *coram rege* (b); and upon complaint of injuries done by the said John king of Scots, now restored to his kingdom, he summoned him **OSTEN** to answer in his courts, Mich. 21, 22 Edward I. Northumb. Scot. He was summoned by the sheriff of Northumberland to answer to Walbese in the king's court, Pas. 21 Edward I. *coram rege*. Rot. 34. He was in like manner summoned to answer John Mazane in the king's bench for an injury done to him; and judgment given against the king of Scots, and that judgment executed.

JOHN king of Scots, being not contented with this subjection, did in the twenty-fourth year of king Edward I. resign back his homage to king Edward, and bid defiance

(b) See note [D] on chap. IX. and 1 Bur. 851.

"*stipatis, &c.*" See Spelman Gloss. in verbo *Scotia*. Whence we may learn, that the province of *Lodovician* was not only situated south of the Tweed, but also extended beyond Durham, and made a part of England. HUME.

to him; wherefore king Edward I. the same year, with a powerful army entered Scotland, took the king of Scots prisoner, and the GREATEST PART (i) of that kingdom into his possession; and appointed the earl Warren to be *custos regni*, — Cressingham to be his treasurer, — and Ormsby his justice; and commanded his judges of his courts of England to issue the king of England's writs INTO SCOTLAND.

AND when, in the twenty-seventh year of his reign, the pope, instigated by the French king, interposed in the behalf of the king of Scotland, he and his nobility resolutely denied the pope's intercession and mediation.

THUS the kingdom of Scotland continued in an ACTUAL subjection to the crown of England for many years. For Rot. Claus. 33 E. I. membr. 13. dorso, and Rot. Claus. 34 E. I. membr. 3. dorso, several provisions were made for the better ordering of the government of Scotland.

WHAT proceedings there were herein, in the time of Edward II. and what capitulations and stipulations were afterwards made by king Edward III. upon the marriage of his sister by Robert de Bruce, touching the relaxation of the SUPERIUS DOMINIUM of Scotland, is not pertinent to what I aim at; which is to shew how the English laws, that were in use and force in the time of Edward I. obtained to be of force in Scotland, which is but this, viz.

(i) Hale, in the very next page, states, that Edward took the "WHOLE" of Scotland into his actual administration, in consequence of his defeating John king of Scots.

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KING EDWARD I. having thus obtained the actual superiority of the crown of Scotland, from the beginning of his reign until his twentieth year, and then placing John de Baliol in that kingdom, and yet continuing his superiority thereof, and keeping his courts of justice, and exercising dominion and jurisdiction by his officers and ministers IN THE VERY BOWELS OF THAT KINGDOM;—and afterwards, upon the defection of this king John, in the twenty-fourth of Edward I. taking the whole (†) kingdom into his actual administration, and placing his own judges and great officers there; and commanding his courts of king's bench, &c. HERE, to issue their process thither; and continuing in the ACTUAL administration of the government of that kingdom DURING LIFE;—it is no wonder that those laws which obtained and were in use in England, in and before the time of this king, were in a great measure translated thither. And possibly, either by being enacted in that kingdom; or at least for so long time put in use and practice there, many of the laws in use and practice HERE IN ENGLAND were, in his time, so riveted and settled in THAT kingdom, that it is no wonder to find they were not shaken, or altered, by the liberal concessions made afterwards by king Edward III. upon the marriage of his sister; but that they remain part of the municipal laws of that kingdom TO THIS DAY.

AND that which renders it more evident; that this was one of the greatest means of fixing and continuing the laws of England in Scotland, is this, viz. This very king Edward I. was not only a martial and victorious, but also A VERY WISE AND PRUDENT PRINCE :—one that very well

(†) Hale has but just before | of Scotland only, not the whole;
stated that the GREATEST PART | was subjugated.

knew how to use a victory, as well as obtain it; and therefore knew it was THE BEST MEANS of keeping those dominions he had powerfully obtained, BY SUBSTITUTING AND TRANSLATING HIS OWN LAWS INTO THE KINGDOM WHICH HE HAD THUS SUBDUED. Thus he did upon his conquest of Wales; and doubtless thus he did upon his conquest of Scotland: and those laws which we find there, so nearly agreeing with the laws of England used in his time, especially the statutes of Westm. 1. and Westm. 2. ARE THE MONUMENTS AND FOOTSTEPS OF HIS WISDOM AND PRUDENCE.

AND as thus he was a most wise prince, and, to secure his conquests, introduced many other laws of his native kingdom into Scotland; so he very well knew the laws of England were excellent laws, fitted for the due administration of justice to the constitution of the governed; and fitted for the preservation of the peace of a kingdom, and for the security of a government: therefore he was very solicitous, by all prudent and careful means imaginable, to graft and plant the laws of England IN ALL PLACES where he might; having before-hand used all possible care and industry for rectifying and refining the English laws to their greatest perfection.

AGAIN, it seems very evident, that the design of king Edward I. was by all means possible, to unite the kingdom of Scotland, as he had done the principality of Wales, to the crown of England: so that thereby Britain might have been one entire monarchy, including Scotland as well as Wales and England under the same sceptre. In order to the accomplishing thereof, there could not have been a better means than to make the interest of Scotland

one

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one with England; and to knit them, as it were, together in one communion: which could never have been better done, than by establishing ONE COMMON LAW AND RULE OF JUSTICE AND COMMERCE among them; and therefore he did, as opportunity and convenience served, translate over to that kingdom as many of our English customs and laws as within that compass of time he conveniently could.

AND thus I have given an essay of the reasons and means, how and why we find so many laws in Scotland parallel to those in England, and holding so much of congruity and likeness to them.

AND the reason why we have but few of their laws that correspond with ours of a later date than Edward I. or at least Edward II. is, because since the beginning of Edward III. that kingdom has been DISTINCT, and held little communion with us till the union of the two crowns in the person of king James I. (1). And in so great an interval it must needs be, that by the intervention and succession of new laws, much of what was so ancient as the times of Edward I. and Edward II. have received many alterations: so that it is a great evidence of the excellency of our English laws, that there remain to this day so many of them in force in that part of Great Britain; continuing to bear

(1) The kingdom of Scotland, notwithstanding the union of crowns on the accession of their king James VI. to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected;

which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. Blac. Com. 1 v. 95.

witnefs, that once that excellent prince Edward I. exercifed dominion and jurifdiction THERE.

AND thus far of the communion of the laws of England to Scotland, and of the means whereby it was effected. From whence it may appear, that as in Wales, Ireland and Normandy, fo alfo in Scotland, fuch laws which in thofe places have a congruity or fimilitude with the laws of England, were derived from the laws of England, AS FROM THEIR FOUNTAIN AND ORIGINAL, and were not derived from any of thofe places to England [C].

[C] However great the difficulties which feemed to obftruct the long-intended and projected union, they were nevertheless in the end entirely done away, and the great work happily effected. This was accomplished at a period fubfequent to the time of Sir Matthew Hale—in 1707—6 Anne;—when twenty-five articles of union were agreed to by the parliaments of both nations; the purport of the moft confiderable being,

That on the firft of May 1707, and for ever after, the kingdoms of England and Scotland fhould be united into one kingdom, by the name of Great Britain.

That the fucceffion to the monarchy of Great Britain fhould be the fame as was before fettled with regard to that of England.

That the united kingdom fhould be represented by one parliament.

That there fhould be a communication of all rights and privileges between the fubjects of both kingdoms, except where otherwife agreed.

That when England raifes 2,000,000*l.* by a land-tax, Scotland fhould raife 48,000*l.*

That the ftandards of the coin, of weights, and of meafures, fhould be reduced to thofe of England.

That laws relating to trade, customs, and the excife, fhould be the fame in Scotland as in England. But that all the other laws of Scotland fhould be in force; fubject to alteration by the parliament of Great Britain: with this caution however, that laws relative to the public policy are alone fubjugated to parliamentary interference; laws relating to private right not being to be altered, unlefs for the evident utility of the people of Scotland.

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Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons.

The sixteen peers to have all privileges of parliament; and all peers of Scotland to be peers of Great Britain, and to have all the privileges of peers, except sitting in the house of lords and voting on the trial of a peer.

These are the principal of the twenty-five articles of union; against some of which, however, the Lords North and Grey, Rochester, Howard, Leigh, Buckingham, and Guildford, protested.

"We humbly conceive, (say the protesting peers) that the sum of forty-eight thousand pounds to be charged on the kingdom of Scotland, as the quota of Scotland, for a land-tax, is not proportionable to the aid granted by the parliament of England: but if by reason of the present circumstances of that kingdom, it might have been thought it was not able to bear a greater proportion, at this time, yet we cannot but think it unequal to this kingdom, that it should be agreed, that when the four shillings aid shall be enacted by the parliament of Great Britain to be raised on land in England, that the forty-eight thousand pounds now raised in Scotland shall never be increased in time to come; though the trade of that kingdom should be extremely improved, and consequently the value of their land proportionably raised, which in all probability it must do, when this union shall have taken effect.

—"And we humbly conceive, that the number of sixteen peers of Scotland is too great a proportion to be added to the peers of England, who very rarely consist of more than one hundred attending lords, in any one session of parliament; and for that reason, we humbly apprehend, such a number as sixteen may have a very great sway in the resolutions of this house, of which the consequences cannot now be foreseen. In the next place, we conceive, the lords of Scotland, who, by virtue of this treaty, are to sit in this house, being not qualified as the peers of England are, must suffer a diminution of their dignity to sit here on so different foundations; their right of sitting here depending entirely on an election, and that from time to time, during the continuance of one parliament only; and at the same time, we are humbly of opinion, that the peers of England who sit here by creation from the crown, and have a right of so doing in themselves, or their heirs, by that creation for ever, may find it an alteration in their constitution, to have lords added to their number, to sit and vote in all matters brought before a parliament, who have not the same tenure of their seats in parliament as the peers of England have,"

Die Jovis 27^o Feb. 1706.

By the statute 5 Ann. c. 8. the articles of union are ratified and confirmed. In this statute there are also two acts of parliament

recited; the one of Scotland, whereby the church of Scotland, and also the four universities of that kingdom, are established for ever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 3 Ann. c. 6. whereby the acts of uniformity of 13 Eliz. and 13 Car. II. (except as the same had been altered by parliament at that time) and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subsequent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that "these two acts shall for ever be observed as fundamental and essential conditions of the union."

Upon these articles, and act of union, it is to be observed, First, that the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both, or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union (a)." Secondly, that whatever else may be deemed "fundamental and essential conditions," the preservation of the two churches of England and Scotland in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity, which establish our common prayer, are expressly declared so to be. Thirdly, that therefore any alteration in the constitution of either of those churches, or in the

(a) It may justly be doubted, (says Blackstone) whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union: for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *federate alliance*, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of revival: and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's *Alliance*, 195.) But the wanton, or imprudent exertion of this right would probably raise a very alarming ferment in the

minds of individuals; and therefore such an attempt might *endanger* (though by no means destroy) the union.

To illustrate this matter a little farther: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honourably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent powers of parliament, or at the instance of mere individuals. *Blac. Com.* 1 v. 97.

liturgy of the church of England, (unless with the consent of the respective churches, collectively or representatively given) would be an infringement of these "fundamental and essential conditions," and greatly endanger the union. Fourthly, that the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particulars unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland (b).

Thus were united two kingdoms, which, by their situation, were destined for the formation of one great and powerful monarchy. And by this solemn junction of its whole native force, Great Britain hath risen to an eminence and to an authority in Europe, which England and Scotland could never have attained.

Those who are desirous of knowing the origin and constitution of the parliament in Scotland before the union, and of the change made by the establishment of one parliament for Great Britain, may consult the treatise on the laws of election for Scotland, with which Mr. Wight hath obliged the public.

The union had not long been effected, before the House of Lords began to exercise its jurisdiction over those articles which related to the peerage. Queen Anne (16th of May, in the 7th year of her reign) created James duke of Queensbury, baron of Rippon, marquis of Beverley, and duke of Dover; remainder (his eldest son being an idiot) to his second son, then earl of Solway in Scotland. On the 21st of January 1708-9, the House of Lords resolved that a peer of Scotland, claiming to sit in the House of Peers by virtue of a patent passed under the great seal of Great Britain, had no right to vote in the election of the sixteen peers who represent the peers of Scotland in parliament.

At a subsequent period (c) the duke of Hamilton having been created duke of Brandon, it was resolved by the lords, that "no patent of honour granted to any peer of Great Britain who was a peer of Scotland at the time of the union, should entitle him to sit in parliament." And afterwards (d), when the Earl of Solway petitioned for his writ of summons as duke of Dover, the question was again agitated, and decided as before (e). In 1782, however, the then duke of Hamilton claimed to sit in the House of Peers as duke of Brandon. The question was ultimately referred to the twelve Judges, who were unanimously of opinion, that a peer of Scotland was competent to receive a patent of peerage of Great Britain, and to enjoy all its incidental privileges; and his grace now sits as duke of Brandon in the House of Peers. In the course of

(b) Blac. Com. 1 v. 96.

(c) Die Jovis 20 Decembris 1711.

(d) A. D. 1719.

(e) 1 P. Wms. 382. 2 Eq. Ca.

Abr. 707. pl. 1.

the year 1787, the attention of the House was again called to the former question. Two of the sixteen peers of Scotland had been created peers of Great Britain. The act of union was silent upon the subject; and the only precedent which existed, was that of the duke of Athol; who, in 1736, being one of the sixteen peers, the English barony of Strange *devolved upon him by INHERITANCE* (f), and which was decided in the affirmative. Notwithstanding which, as the negative appeared to be strongly supported by every principle of equity, analogy, and fair construction, the question was brought forward for public decision. Accordingly on the 13th of February 1787, the House resolved itself into a committee of privileges, for the purpose of taking it into consideration. The motion was, "that it is the opinion of this committee, that the Earl of Abercorn, who was chosen to be of the number of the sixteen peers, who by the treaty of union are to represent the peerage of Scotland in parliament, having been created Viscount Hamilton, by letters patent under the great seal of Great Britain, doth thereby cease to sit in the House as a representative of the peerage of Scotland." The motion was carried by a majority of 32 to 38; and was followed by a similar one respecting the duke of Queensbury, who had been created baron Douglass. On the 18th of May following, it was resolved, that a copy of the resolution of 1709, should be transmitted to the lord register of Scotland, as a rule for his future proceedings in elections. The duke of Queensbury and the marquis of Abercorn nevertheless persisted in their right to vote in the election of peers to represent the peerage of Scotland in parliament; and therefore in the general election of 1790, tendered their votes, as peers of Scotland, to the lord register, who, in obedience with the resolutions before stated, thought proper to reject them. Of this they complained, by way of petition, to the house of peers, praying, at the same time, that their votes might be reckoned. A committee of privileges reported that "the votes, if duly tendered, ought to have been counted." To which the house, on the 6th of June 1793, agreed, without a division. Contrary as this decision certainly is to the former resolutions, yet it was come to, after great deliberation, and after the subject had been fully argued and thoroughly investigated. It should seem that the former resolutions were not binding, inasmuch as they were not only contrary to the express terms and meaning of the articles of union, to law, justice, and the constitution, but had never been sanctioned either by practice or acquiescence (g).

(f) That was by a descent; and even as to the latter question, I believe no objection was ever made to a peer of England taking a Scotch title,

by descent.

(g) See Parl. Reg. by Debrett, vol. xxxvi.

On the 23d of May 1787, another question respecting the construction of the act of union was agitated in the house of commons. It arose in consequence of the succession of the earl of Wemyss to that earldom; whose eldest son, Francis Charteris, lord Elcho, represented the boroughs of Lauder, &c. in Scotland. By the ancient parliamentary law of Scotland, the eldest sons of peers could not sit in the house of commons; and by an article in the act of union, it is provided, that the two kingdoms should participate reciprocally in the privileges, rights, and immunities of each other. The motion made was, "that a new writ should be made out for electing a member for the districts of Lauder, &c. in the room of Francis Charteris, esq. now become the eldest son of a peer of Scotland, and therefore incapable of representing the said districts in this house." The motion was carried without a division (b).

(b) Ann. Reg. for 1787, p. 147. 26 March 1793. Deb. Parl. Reg. Wight 269. And see lord Daer's case, vol. xxxvi. p. 143, determined in the House of Lords,

C H A P. XI.

Touching the course of DESCENTS in England.

AMONG the many preferences that the laws of England have above others, I shall single out TWO PARTICULAR TITLES, which are of common use, wherein their preference is very visible. The due consideration of their excellence therein, may give us a handsome indication, or specimen, of their excellencies above other laws, in other parts or titles of the same, also.

THE titles, or *capitula legum*, which I shall single out for this purpose, are these two, viz. first, the hereditary transmission of lands from ancestor to heir, and the certainty thereof; and secondly, the manner of trial BY JURY; which, as it stands at this day settled in England, together with the circumstances and appendixes thereof, is certainly THE BEST MANNER OF TRIAL IN THE WORLD. And I shall herein give an account of the successive progress of those *capitula legis*, and what growth they have had in succession of time, till they arrived to that state and perfection which they have now obtained.

FIRST, then, touching descents and hereditary transmissions.

It seems by the laws of the Greeks and Romans, that the same rule was held both in relation to lands and goods,
where

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where they were not otherwise disposed of by the ancestor, which the Romans therefore called *SUCCESSIO AB INTES TATO*. But the customs of particular countries, and especially here in England, do put a great difference, and direct a SEVERAL method in the transmission of goods or chattels, and that of the inheritances of LANDS.

Now as to hereditary transmissions or successions, commonly called with us *DESCENTS*, I shall hold this order in my discourse, viz.

FIRST, I shall give some short account of the ancient laws of the Jews, the Greeks, and the Romans, touching this matter,

SECONDLY, I shall observe some things, wherein it may appear, how the particular customs, or municipal laws, of other countries varied from those laws, and the laws HERE formerly used.

THIRDLY, I shall give some account of the rules and laws of descents, or hereditary transmissions, as they FORMERLY stood, and as at this day they stand, in England; with the successive alterations that process of time, the wisdom of our ancestors, and certain customs grown up, TACITLY, GRADUALLY, and SUCCESSIVELY, have made therein.

AND first, touching the laws of succession, as well of descent of inheritances of lands, as also of goods and chattels; which, among the Jews, was the same in both,

MR. SELDEN, in his book *De Successionibus apud Hebraeos*, has given us an excellent account, as well out of the
holy

holy text, as out of the comments of the rabbins, or Jewish lawyers, touching the same; which you may see at large in the fifth, sixth, seventh, twelfth and thirteenth chapters of that book; and which, for so much thereof as concerns my present purpose, I shall briefly comprize under the eight following heads, viz. (a).

FIRST, that in the descending line, the descent or succession, was to ALL the sons; only the ELDEST son had a DOUBLE portion to any one of the rest; if there were three sons, the estate was to be divided into four parts, of which the eldest was to have two fourth parts, and the other two sons were to have one fourth part each.

SECONDLY, if the son died in his father's life-time, then THE GRANDSON, and so *in infinitum*, succeeded in the portion of his father, as if his father had been in possession of it, according to the *jus representationis* NOW IN USE HERE.

THIRDLY, the daughter did NOT succeed in the inheritance of the father, AS LONG AS THERE WERE SONS, OR ANY DESCENDANTS FROM SONS, IN BEING;—but if any of the sons died in the life-time of his father HAVING DAUGHTERS, but WITHOUT SONS, the daughters succeeded in his part, as if he himself had been possessed.

FOURTHLY, and in case the father left only daughters and no sons, THE DAUGHTERS EQUALLY SUCCEEDED to their father, as in COPARTNERSHIP, without any prelation, or preference, of the eldest daughter, to two parts, or a double portion.

(a) Vide Numb. ch. xxvii. Blac. Com. 2 v. 213.

FIFTHLY,

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FIFTHLY, but if the son had purchased an inheritance, and died without issue, LEAVING A FATHER AND BROTHERS, the inheritance of such son so dying, did NOT descend to the brothers;—unless in case of the next brother's taking to wife the deceased's widow, to raise up children to his deceased brother:—but in such case, THE FATHER INHERITED to such son entirely.

SIXTHLY, but if the father in that case was dead, then it came to the brothers, as it were, AS HEIRS TO THE FATHER, in the same manner as if the father had been actually possessed thereof; and therefore the father's other sons, and their descendants *in infinitum*, succeeded; but yet especially, and WITHOUT ANY DOUBLE PORTION TO THE ELDEST: because though in truth the brothers succeeded, as it were, in right of representation FROM THE FATHER, yet if the father died BEFORE the son, the descent was DE FACTO immediately from the brother deceased to the other brothers; IN WHICH CASE their law gave NOT a double portion: and in case the father had no sons, or descendants from them, then it descended to ALL THE SISTERS.

SEVENTHLY, if the son died without issue, and his father, or any descendants from him, were extant, it went NOT to the grandfather or his other descendants. But if the father was dead without issue, then it descended to the grandfather. And if he were dead, then it went to HIS sons and their descendants; and for want of them, then to HIS DAUGHTERS or their descendants;—as if the grandfather himself had been actually possessed, and had died; and so *mutatis mutandis* to the *proavus*, *abavus*, *atavus*, &c. and their descendants.

EIGHTHLY,

EIGHTHLY, but the inheritance of the son NEVER RESORTED TO THE MOTHER, or to any of her ancestors; but both she and they were TOTALLY EXCLUDED from the succession.

THE double portion, therefore, that was *jus primogenitura*, never took place but in that person that was the *primogenitus* of him from whom the inheritance IMMEDIATELY descended, or HIM that represented him.—As if *A.* had two sons, *B.* and *C.*—and *B.* the ELDEST had two sons, *D.* and *E.*—and then *B.* died;—whereas *B.* should have had a double portion, viz. two thirds IN CASE HE HAD SURVIVED HIS FATHER,—but now this double portion shall be equally divided between *D.* and *E.*—and *D.* shall NOT have two thirds of the two thirds that descended from *A.* to them. Vide Selden, ut supra.

THUS much of the laws, or rules, touching descents among the Jews.

AMONG the Grecians (*b*), the laws of descents in some fort resembled those of the Jews, and in some things they differed. Vide Petit's *Leges Atticae*, cap. 1. tit. 6. *De Testamentis & Hereditario Jure*, where the text of their law runs thus, viz.

“ OMNES legitimi filii hæreditatem paternam ex æquo
 “ inter se hærescunt, si quis intestatus moritur relictis
 “ filiabus qui eas in uxores ducunt hæredes sunt, si nullæ
 “ superint, hi ab intestato hæreditatem cernunt: et
 “ primo quidem fratres defuncti Germani, et legitimi fra-

(*b*) At least among the Athenians—see Blac. Com. 2 v. 213. and Pot. Archæ. Græca, l. 4. c. 15.

"trum filii hæreditatem simul adeunto; si nulli fratres aut
 "fratrum filii supersint, iis geniti eadem lege hæreditatem
 "cernunto: masculi autem iis geniti etiam si remotiori
 "cognitionis sint gradu, præferuntor, si nulli supersint,
 "paterni proximi, ad sobrinorum usque filios, materni de-
 "functi propinqui simili lege hæreditatem adeunto; si e
 "neutra cognatione supersint intra definitum gradum
 "proximus cognatus paternus, addito notho nothave;
 "superstite legitima filia nothus hæreditatem patris ne
 "addito."

THIS law is VERY OBSCURE. The sense thereof seems
 to be briefly this: That all the sons EQUALLY shall inherit
 to the father; but if he have no sons, then the husbands of
 the daughters; and if he have no children, then his bro-
 thers and their children; and if none, then his next kindred
 on the part of his father, PREFERRING THE MALES BEFORE
 THE FEMALES; and if none of the father's line, *ad sobri-
 norum usque filios*, then to descend to the mother's line. Vide
 Petie's Gloss thereon [A].

AMONG

[A] The Editor of the first edition of this History (c) makes the following remark on the observation of Hale upon the law from Petie.

"But with all respect to the memory of this great good man, I
 shall venture to translate this law, whereby it will appear, what
 the true sense and meaning thereof is, and that it is not so difficult or
 obscure as our author has represented it."

"All the lawful sons shall inherit their father's estate, to be
 "equally divided between them. If any person dies intestate,
 "leaving only daughters, their husbands shall be his heirs; but if
 "none of the daughters be living, they (i. e. the husbands) shall
 "not inherit to the intestate. But then in the first place, the brothers
 "of the whole blood, and such brothers children, shall inherit
 "together, (i. e. the children *jure representationis*) and if there are
 "no brothers, or brothers children, living, then their descendants, if

(c) Ed. 1713. pa. 212.

"they

AMONG the Romans it appears, that the laws of successions, or descents, DID SUCCESSIVELY VARY; for the laws

of the first, it is said, were, that the nearest of

kindred, who were living, should inherit the estate

“they leave any, shall inherit by the same law of equal distribution;

“yet still the males and their descendants, though of the more re-

“mote degree of kindred, are to be preferred. But if none of the

“father’s blood be living, of any nearer degree than that of father’s

“brother’s children, then the inheritance shall descend to those of

“the mother’s blood, having a like regard to the law of distribu-

“tions, and the mother’s brother’s children. But if none of either

“line, within the degrees before specified, be living, then it shall

“descend to any of the father’s blood, though an illegitimate son or

“daughter; but if a legitimate daughter were living, no bastard shall

“succeed in the inheritance of the father. Vide Petit’s Gloss.

in banc legem.

Sir Matthew Hale has professed to touch very shortly on the

subject. Contenting himself with transcribing the version of Petit,

without having recourse to the authors by whom the originals are

preserved and explained, his account of the Attic laws is remarkably

superficial and erroneous. He complains that the “law is very ob-

“scure.” It is indeed, as he cites it, not only dark, but corrupt;

and the sense which he collects from it, is by no means perspicuous.

A desire of removing this obscurity, and of supplying a defect,

however unimportant, in the work of so great a man, induced Sir

William Jones, the ablest linguist of his age and nation, to publish a

translation of the “Speeches of Iſæus, in Causes concerning the Law

of Succession to Property at Athens.” From this ingenious work I

have selected the following Attic laws.

ALL GENUINE, UNADOPTED CITIZENS MAY DEVISE THEIR

ESTATES AS THEY THINK FIT, PROVIDED THAT THEY HAVE NO

LEGITIMATE CHILDREN, AND BE NOT DISABLED BY LUNACY,

OR AGE, OR POISON, OR DISEASE; NOR INFLUENCED BY WOMEN,

SO AS TO HAVE LOST THEIR REASON FROM ANY OF THESE

CAUSES; NOR BE UNDER ANY DURESS OR CONFINEMENT.

THE WILLS OF SUCH AS HAVE LEGITIMATE SONS SHALL

STAND GOOD, IF THOSE SONS DIE BEFORE THEIR AGE OF SIX-

TEEN YEARS.

IF A MAN HAVE LEGITIMATE DAUGHTERS, HE MAY DEVISE

HIS ESTATE AS HE PLEASES, ON CONDITION THAT THE DEVI-

SEES TAKE THEM IN MARRIAGE.

ADOPTED SONS SHALL NOT DEVISE THE PROPERTY ACQUIR-

ED BY ADOPTION; BUT IF THEY LEAVE LEGITIMATE SONS,

THEY

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of the Twelve Tables did exclude the females from inheriting, and had many other strenghtnesses and hardships, which were successively remedied. First, by the emperor Claudius; and after him by Adrian, in his *Senatus Consultus Tertullianus*; and after him by Justinian in his Third

THEY MAY RETURN TO THEIR NATURAL FAMILY. IF THEY DO NOT RETURN, THE ESTATES SHALL GO TO THE HEIRS OF THE PERSONS WHO ADOPTED THEM.

THE ADOPTED SON AND THE AFTER-BORN SONS OF THE PERSON WHO ADOPTED HIM, SHALL BE COHEIRS OF THE ESTATE; BUT NO ADOPTION BY A MAN WHO HAS LEGITIMATE SONS THEN BORN, SHALL BE VALID.

IF A CITIZEN DIE INTESTATE AND LEAVE DAUGHTERS, THE NEAREST KINSMEN WHO MARRY THEM SHALL INHERIT THE ESTATE; BUT IF HE DIE CHILDLESS, HIS BROTHERS BY THE SAME FATHER SHALL BE HIS HEIRS, AND THE LEGITIMATE SONS OF THOSE BROTHERS SHALL SUCCEED TO THE SHARE OF THEIR FATHERS. IF THERE BE NO BROTHERS, THE SISTERS ON THE FATHER'S SIDE, AND THEIR CHILDREN, SHALL INHERIT. ON FAILURE OF SISTERS AND NEPHEWS, THE COUSINS ON THE FATHER'S SIDE SHALL BE HEIRS IN THE SAME MANNER; BUT MALES AND THE CHILDREN OF MALES SHALL BE PREFERRED, ALTHOUGH IN A REMOTE DEGREE, PROVIDED THEY BELONG TO THE SAME BRANCH. IF THERE BE NO KINSMAN ON THE FATHER'S SIDE SO NEAR AS THE SECOND COUSIN, THEN LET THOSE ON THE MOTHER'S SIDE SUCCEED TO THE ESTATE IN THE SAME ORDER. SHOULD THERE BE NO MATERNAL KINSMEN, WITHIN THE DEGREE ABOVE LIMITED, THE NEXT PATERNAL KINSMEN SHALL BE THE HEIRS.

NO MALE OR FEMALE BASTARD, BORN AFTER THE ARCHONSHIP OF EUCLID, SHALL SUCCEED EITHER TO SACRED OR CIVIL RIGHTS.

The Athenians made no difference between the transmission of real and personal property. In these laws, therefore, the words *devise, beir, inheritance*, and the like, are applied both to lands and to goods, without being restrained to the peculiar sense in which we use them (d).

(d) Jon. Meus, 37.

Institutes, cit. *De Hæreditatibus quæ ab Intestate deferuntur*, and the two ensuing titles. And again, all this was further explained and settled by the Novel Constitutions of the said Justinian, stiled *Authenticæ Novellæ*, cap. 18. *De Hæreditatibus ab Intestate venientibus. Et Agnatorum Jure sublato*. Therefore omitting the large inquiry into the successive changes of the Roman law in this particular, I shall only set down how, according to that Constitution, the Roman law stands settled therein [B].

[B] The preference of males to females was totally unknown to such of the laws of Rome as are at present extant.

Cum filius filiarum (says the emperor) et ex altero filio nepos neptive existunt, pariter ad hæreditatem avi vocantur, nec, qui gradu proximior est, ulteriorem excludit: æquum enim esse videtur, nepotes neptive in patris sui locum succedere. Pari ratione et si nepos neptive sit ex filio, et ex nepote pronepos proneptive, simul vocantur. Et, quia placuit, nepotes neptive, item pronepos proneptive, in patris sui locum succedere, conveniens esse visum est, non in capita, sed in stirpes, hæreditatem dividere, ut filius partem dimidiam hæreditatis habeat, et ex altero filio duo pronepos nepotes alteram dimidiam. Item, si ex duobus filiis nepotes neptive existant, ex altero unus aut duo fortes, ex altero tres vel quatuor, ad unum aut duos dimidia pars pertineat, ad tres vel quatuor altera dimidia. Inst. lib. 3. tit. 1. § 6. 1. 1.

Item ex duobus filiis. By the civil law, representation takes place in infinitum in the right line descending, and therefore it follows, according to that law, that when any person dies, leaving grandchildren by sons or daughters, who died in his life-time, such grandchildren, though equal in degree and unequal in their number, in regard of their respective stocks, will divide the estate of their grandfather *per stirpes*, i. e. according to their stocks; for example, if Titius dies worth nine hundred *aurei*, and intestate, leaving only grandchildren by three sons, already dead, — e. g. three grandchildren by one son, five by another, and six by another, then each of these classes of grandchildren would be intitled to a third; that is, to three hundred *aurei*, no regard being paid to that class in which there were most persons. In hoc casu, (says Vinnius) maxime conspicua est vis representationis; licet enim omnes hic pari gradu sint, ut proprio singuli jure succedere posse videantur, tamen postquam semel placuit, nepotes in locum patris sui demortui, aliæ ratione exuti jure sui hæredis, succedere, non debuit hoc jus ex accidenti aliquo variari, puta ut soli nepotes ex diversis filiis et numero inæquales, seu pauciores cum pluribus

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pluribus ex hac vel illa stirpe concurrentes, in capita hæreditatem dividenterent.—Cod. 6. n. 35. l. 2. Quare sic in universum rectè definitus, descendentes ex masculis omnes, qui sunt diversarum stirpium, quantumvis ejusdem omnes gradus, in stirpes, non in capita, succedere.

The succession to the estates of intestates, was one of the most uncertain points of the Roman law. Even the distribution which had for some time prevailed, took a different turn; and even that while the emperor was compiling his body of law; for the system of the *Novels* (the CXVIII. particularly) defeats the doctrine laid down in several of the titles of the Third Book of the Institutes, where the point was considered, and meant to be established. With the *Novels*, however, it settled, and the great rule of succession among the Romans, *quoad* descendants, is comprized in these few reflections:—that descendants, while they lasted, should exclude all other relations whatsoever;—that there should be no respect had to primogeniture; nor any preference in regard to sex;—that there should be no exclusion, even of the most remote degree: and lastly, that the estate of the intestate should make so many *general* shares, as there should be distinct heads, in his immediate descendants.

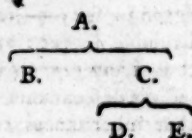
Hence it is obvious that inheritances could never revert, or be thrown upwards (*inter ascendentes*), nor be turned aside (*inter collaterales*), so long as any were to be found in the line of descendants *in infinitum*. For the principle upon which this succession rested, was the *jus representationis*, which cannot be fairly or reasonably imagined in any other line than in that to which we give existence. There is something of successive in the idea of representation; something which looks like keeping up an order or a series; and though to brothers it may be applied in some sense, to fathers and grandfathers it can be applied in little or none.

The disregard of sex and primogeniture, in which these people differed from most others, as well before as after them, are of so arbitrary a consideration, that little remains to be observed upon that disposition. But natural equity has a great share in the two last, and calls for some regard.

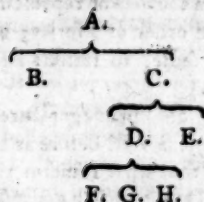
That descendants of the second, third, or fourth degree should be raised to a kind of level with those of the first, and not stand excluded, even while some of the first remain; and that children of a remote descent should inherit along with the immediate one; is agreeable to truth and justice. The grandchildren; &c. of *Sempronius* by a son that is gone, stand to *Sempronius* in the place of that son. They would have had their shares through that father, if he had lived; and represent him therefore; or succeed to his rights, now he is removed. And hence, because many children may succeed into one father's rights, it follows that the *jus representationis*, which transmits the estate of *Sempronius* to his immediate descendants, shall undergo a considerable alteration in those descents or generations that follow after. Though *Sempro-*

DESCENTS or successions from any person are of three kinds, viz. First, in the descending line. Secondly, the ascending line. Thirdly, the collateral line; and this latter is

nus may be represented by any number of children indifferently, and his estate cut into so many shares accordingly, yet will each of those children be represented by their whole families; not by so many distinct heads of children, as Sempronius was, but by all their children collectively (let their number be what it will) laying as it were, their heads together to form one common stock: for all those grandchildren *gregatim*, have that right in common, not separate to each, which their father had to himself. And this is called *successio in stirpes*; the other, when all share alike, *in capita*. Thus in the scheme,



the estate of Sempronius (A.) will be divided into two equal parts, and B. and C. will each be heirs *ex semisse*. But supposing that C. is gone before his father, then shall B. still be *heres ex semisse*, and D. and E. *ex quadrante*, each. Or put the case



that C. and D. should each be gone, and E. be represented by F. G. and H.—then will B. as before, be *heres ex semisse*; E. *ex quadrante*; and F. G. and H. will succeed each of them *ex uncia*. Or put the case that E. is dead without issue also, then will F. G. and H. be each of them, *heres ex sextante*. Taylor's Elements of the Civil Law, 538. As to the doctrine respecting ascendants and collaterals, see Id. 539 to 544. See also Domat's Civil Law, part 2. lib. 2. tit. 1, 2, 3.—And in general as to the right of property, inheritance, and succession, and civil degrees of kindred among the Romans, see Gib. Hist. § v. c. 70.

either

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either IN AGNATOS A PARTE PATRIS; or, IN COGNATOS A PARTE MATRIS [C].

FIRST, in the descending line, these rules are by the Roman law directed, viz,

FIRST, the descending line, whether male or female, whether immediate or remote, takes place; and prevents the descent or succession, ascending or collateral, *in infinitum*.

SECONDLY, the remote descents of the descending line succeed IN STIRPEM,—i. e. in that right which the parent SHOULD HAVE HAD.

[C] Sunt autem agnati, (a) cognati per virilis sexus cognationem conjuncti, quasi a patre cognati: veluti frater ex eodem patre natus, fratris filius, neposve ex eo: item patruus et patruus filius, neposve ex eo: at, qui per feminini sexus personas cognatione junguntur, agnati non sunt, sed alias naturali jure cognati. Itaque amittæ tuæ filius non est tibi agnatus, sed cognatus: et invicem tu illi eodem jure conjungis: quia, qui ex ea nascuntur, patris non matris, familiam sequuntur. Inst. lib. 1. tit. 15. § 1.

Sunt autem agnati, cognati per virilis sexus personas cognatione conjuncti, quasi a patre conati (b). Itaque ex eodem patre nati fratres, agnati sibi sunt; qui et consanguinei vocantur; nec requiritur, an etiam eandem matrem habuerint. Item patruus fratris filio, et invicem is illi, agnatus est. Eodem numero sunt fratres patruales, id est, qui ex duobus fratribus procreati sunt, qui etiam consobrini (c) vocantur. Qua ratione etiam ad plures gradus agnationis pervenire poterimus. Ii etiam, qui post mortem patris nascuntur, jura consanguinitatis nascuntur. Non tamen omnibus simul agnatis dat lex hæreditatem; sed iis qui tunc proximior gradu sunt, cum certum esse ceperit, aliquem intestatum decessisse. Inst. lib. 3. tit. 2. § 1. and see Taylor's Elem. 314.

(a) The distinction between the *agnati* and *cognati*, is entirely taken away by Justinian. Nov. 118. cap. 4. 5.

(b) A patre conati] "cognatio est nomen generale; sed non tantum generale; plerumque autem speciale est, et proprium eorum, qui vel per

seminei sexus personas conjunguntur

"tur vel capitis diminutione jura agnationis amiserunt."

(c) Consobrini] "Per abusionem sic dicti; consobrini enim proprie sunt, qui ex duobus fororibus nati sunt; ita dicti, quasi consobrini,"

Theoph.

THIRDLY, this descent, or succession, is **EQUAL** in all the daughters, all the sons, and all the sons and daughters, **WITHOUT PREFERRING THE MALE BEFORE THE FEMALE.**—So that if the common ancestor had three sons, and three daughters, **EACH** of them **HAD A SIXTH PART.** And if one of them had died in the life of the father, having three sons and three daughters, the sixth part that belonged to **THAT PARTY**, should have been divided **EQUALLY BETWEEN HIS** or **her SIX CHILDREN.** And so *in infinitum* in the descending line.

SECONDLY, in the ascending line, there are these two rules, viz.

FIRST, if the son dies **WITHOUT ISSUE**, or any descending from him, having a father and a mother living; **BOTH OF THEM SHALL EQUALLY SUCCEED** to the son, and prevent all others of the collateral line, except brothers and sisters. And if only a father, or only a mother, he or she shall succeed **ALONE**,

SECONDLY, but if the deceased leaves a father and a mother, **WITH A BROTHER AND A SISTER, *ex utrisque parentibus conjuncti***, they all four shall **EQUALLY SUCCEED** to the son, by equal parts, without preference of the males,

THIRDLY, in the collateral line, i. e. where the person dies **WITHOUT** father or mother, son or daughter, or any descending from them **IN THE RIGHT-LINE**—the rules are these, viz.

FIRST, the brothers and sisters, **EX UTRISQUE PARENTIBUS CONJUNCTI**, and the **IMMEDIATE** children of them, shall succeed **EQUALLY**, without preference of either sex; and the children from them shall succeed **IN STIRPES.**—As if there be a brother and sister, and the sister dies in the life of the descendant,

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descendant, leaving one or more children, all such children shall succeed IN THE MOIETY that SHOULD HAVE COME to their deceased mother, had she survived,

SECONDLY, but if there be no brothers or sisters, EX UTRISQUE PARENTIBUS CONJUNCTI, nor any of their immediate children,—then the brothers and sisters of the HALF blood, and their immediate children, shall succeed IN STIRPES to the deceased,—without any prerogative to the male.

THIRDLY, but if there be no brothers or sisters of the whole, or half blood, nor any of their immediate children—for the grandchildren are not provided for by the law—then the NEXT KINDRED are called to the inheritance,

[BUT, by the author's leave, [adds a preceding Editor] I think the grandchildren are impliedly provided for, as they succeed their father or mother *jure representationis*.]

FOURTHLY, and if the next kindred be in an EQUAL degree, whether on the part of the father, as AGNATI, or on the part of the mother, as COGNATI, then they are EQUALLY called to the inheritance, and succeed IN CAPITA, and not IN STIRPES.

THUS far of the settled laws of the Jews, Greeks, and Romans. But the particular, or municipal laws and customs of almost every country derogate from those laws, and direct successions in a much different way. For instance,

By the customs of Lombardy, according to which the rules of the feuds, both in their descents and in other things, are much directed, their descents are in a much different manner, VIZ,

Leges Feudarum, lib. 1. tit. 1. If a feud be granted to one brother, who dies without issue, it descends NOT to his other brother, UNLESS IT BE SPECIALLY PROVIDED FOR IN THE FIRST INFEUDATION. If the donee dies, having issue sons and daughters, it descends ONLY TO THE SONS.—Whereas by the Roman law, it descends to both. The brother succeeds not to the brother, unless specially provided for. *Ibid. tit. 50.* The ascendants succeed NOT, but only the descendants. Neither does a daughter (c) succeed NISI EX PACTO, VEL NISI SIT FEODUM FOEMINEUM [D].

(c) It was one reason given in the feudal law, for the exclusion of daughters, *quia filia servi-*

tia præstare non possunt. But see Blac. Com. 2 v. 214. and Sulliv. Lect. xiv.

[D] As to the descent of inheritances by the feudal law, it may not be unnecessary, in the first place, to observe, that feuds, fiefs, or fees, were originally precarious, and held at the will of the lord (a).

A precarious tenure during pleasure, was not sufficient to satisfy those who held it; to attach them therefore to their superior lord, they soon obtained the certainty of them for one year (b), and afterwards for life (c): but though feuds were not then hereditary, yet the vassals of feudal tenants were called *nativi*, as if born such; and it was unusual, and, whenever done, was thought hard, to reject the heir of the former feudatory, provided he was of ability to do the services of the feud, and the lord had no just objection against him (d).

(a) Antiquissimo tempore sic erat in dominorum potestate connexum, ut quando vellent, possent auferre rem in feudum sibi datam. Feud. lib. 1. tit. 1. Statim ab initio originis feudorum in homini feudum concedentis potestate fuit, feudum concessum quodcumque vellet precarii instar, revocare. Hanne-ton de jure feud. 139. Som. Treat. of Gav. 108. Innumerable proofs might be added to those produced in l'Esprit du Loix, l. 30. c. 16. and by Du Cange voc. *beneficium* & *feudum*.

(b) Postea vero eo ventum est ut per annum tantum firmitatem haberent. Feud. lib. 1. tit. 1. Deinde usu inolevit ut per annum integrum

feudum semel concessum firmitatem haberet. Hanne-ton de jure feud. 139.

(c) Deinde statutum est ut usque ad vitam fidelis produceretur. Feud. lib. 1. tit. 1. Postea vero eo ventum est, ut ad recipientis vitam perduraret. Hanne-ton de jure feud. 139. Du Cange produces several quotations from ancient charters and chronicles in proof of this. Gloss. voc. *beneficium*.

(d) Licet hæreditaria successio tum non erat in feudis, nativi tamen hi tenentes dicebantur ut apud nos hodie, quos nisi justa offensæ causa præcesserit, et ad serviendum non fuissent, durum erat a suis possessionibus removere. Crag. de jure feud. 20, 21.

But

If we come nearer home, to the laws of Normandy, lands there are of two kinds, viz. PARTIBLE, and NOT PARTIBLE.

The

But though the lord did not remove the heir from the *feud*, yet it is not likely that he succeeded absolutely as of course; but that he paid a fine, or made some acknowledgment, in the nature of *relief*, (*e*) for the removal of the feud; and though that was originally made in order to secure the succession, which was then, in every sense of the expression, at the will of the lord; yet it was continued even after feuds became hereditary (*f*), and is well known at this day (though by several names) in most countries.

Feuds were afterwards extended beyond the life of the first vassal, or feudal tenant, to his sons or some one of them, whom the lord should name (*g*); but in such case the feudal donation (*b*) was not extended beyond

(*e*) *Relevium est præstatio hæredum, qui quum veteri jure feudali non poterant succedere in feudis, caducam, et incertam hereditatem relevabant, soluta summa vel pectuniæ vel aliarum rerum pro diversitate feudorum.*—Schilt. Cod. de bonis laudemialibus, sect. 52. According to Hotoman, *relevium* dicitur honorarium, quod novus vassallus patrono introitus causa largitur, quasi morte alterius, vel alio quo casu feudum ceciderit, quod jam a novo sublevetur. Hot. de verb. feudali. et Gloss. ad X. Scriptores ad verb. *relevium*.

(*f*) Thus in Germany, the old acknowledgment was continued by an express provision in the constitution, by which feuds were made hereditary; viz. *Servato usu majorum valvasorum in dandis equis et armis suis senioribus.* Vide Feud. lib. 1. tit. 1. et Leges Longobard. lib. 3. tit. 8. sect. 4.

(*g*) Sic progressum est ut ad filios deveniret, in quem (scilicet) dominus hoc vellet beneficium confirmare. Feud. lib. 1. tit. 1. Proindeque receptum ut ad eos vassalli filios quibus id beneficii feudi dominos concessisset deveniret, et postmodum temporis tractu inductum est ut ad omnes vassalli filios masculos intestata feudi successio æqualiter pertineret. Hanneken de jure feud. 139.

Schilt. Cod. de nat. succ. feud. cap. 3. § 5. They were rendered hereditary first in the direct line—then in the collateral, and at last in the female line. Leg. Longob. l. 3. tit. 8. Du Cange voc. *beneficium*.

(*b*) Though the feudists have generally considered feuds as mere donations, yet Mr. Somner (Treat. of Gav. 111.) says, that the feudal grant, in respect of the incident services, is improperly called a donation, being but *feudalis donatio*, i. e. a demise in fee; but still the feudists properly enough called it a donation. First, because it was not originally supposed to be made for any immediate or contracted equivalent; and the services were rather consequents of the relation arising from the feud or the general feudal policy, than immediate returns, in consideration of the feud or benefit conferred by the lord; and thus Grotius must be understood, when he says (in his treatise De Jure Belli et Pacis, lib. 2. cap. 12. sect. 5.) that in *feudali contractu rei feudalis concessio beneficium est, pactio autem militaris operæ præstata est, facio ut facias*. Secondly, because as the lord had the free choice of his vassal, and conferred the feud on whom he pleased, and the services of the feud were not so much calculated for

The lands that are partible, are valvasories, burgages, and such like, which are much of the nature of our socage-lands; these descend

beyond the words by any presumed intent, but was taken strictly (1); inasmuch that if the donation was to a man and his sons, all the sons succeeded *in capita*; and if one of them died, his part did not descend to his children, or survive to his brothers, but returned to the lord (2). The reason for such a restriction in the mode of descent, should seem to be, that as the personal ability of the feudatory to perform the duties of the fief was the motive of the grant, added to the obligation under which his fealty laid him to educate his offspring in a full sense of obedience to his lord, and with fit qualifications for his service in war—that, therefore, the fief was not permitted to go to the collateral relations of the first feudatory, whom he could not bind by his acts, and over whose education he had no influence.—Though, therefore, it is evident, that where, in the original grant, there were no particular directions to guide the descent, the descendants of the first acquirer, and none others, were admitted, yet if it was not otherwise particularly expressed, the collaterals succeeded; because, as it is conceived, the merit of their blood was part of the consideration; not so properly in the right of heirs, as by way of remainder, under the original charter or grant. Dalrym. on Feud. Prop. c. 5. s. 1.

It is no easy matter to fix the precise time when each of these changes took place. M. l'Ab. Mably conjectures, with some probability, that Charles Martel first introduced the practice of the grants for life—Observat. tom. 1. p. 103, 160; and that Louis le Debonnaire was among the first who rendered them hereditary, is evident from the authorities to which he refers; Id. 429. Mabillon however has published a *placitum* of Louis le Debonnaire, A. D. 860. by which it appears, that he still continued to grant them only during life. De Re

for the particular advantage of the lord, as for the defence of the community united under a feudal policy; the preference given, and interest moving from the lord, was a benefit conferred in such a manner, that, in respect to the lord, it might very well be called a donation: et licet, says Crag. (de jure feud. 42.) feuda alter hodie comparentur, interveniente sæpissimè pretio, aut alia re pro pretio denominatio tamen sit ab eo quod prævalet.—Et quanquam pretio interveniente, tamen justum pretium nunquam numerasse præsumitur, qui se fidelitatis et obsequii vin-

culo alii astringit; vinculum enim hoc obsequii pro parte pretii est: itaque feudum liberum et gratuitam donationem definimus ad illud quod fieri debet attendentes, non ad id quod in hoc corrupto sæculo apud degeneres homines in usu frequenti videmus.

(1) Feudum ex sua natura est species quedam dominationis, et æquum est ut omnes donationes sint stricti juris, ne quis plus donasse præsumatur, quam in donatione expresserit. Crag. de jure feud. 30.

(2) Crag. de jure feud. 21, 22.

descend to ALL the sons, or to all the daughters. Lands NOT partible, are FIEFS AND DIGNITIES.—They descend to the

ELDEST

Diplomatica, l. 6. p. 353. In the year 889, Odo king of France granted lands to Ricabodo *fidei suo juri beneficiario et fructuario*, during his own life, and if he should die, and a son should be born to survive him, that right was to continue during the life of his son. Mabillon ut supra, p. 556. This was an intermediate step between fiefs merely during life, and fiefs hereditary to perpetuity. While they continued under the first form, and were held only during pleasure, he who granted them not only exercised the *dominium* or prerogative of superior lord, but retained the property, giving his vassal only the *usufruct*. But under the latter form, when they became hereditary, although the feudal lawyers continued to define a fief agreeably to its original nature, yet the property, in effect, was taken out of the hands of the superior lord, and lodged in those of the vassal.

In process of time, grandchildren succeeded to sons, and brothers to brothers (l), if the *feud* was *antiquum aut paternum*, that is, not newly purchased, but came to the brother by descent from his father: but if the feud was what the feudists called *novum*, that is, newly purchased or acquired by a brother, a brother was not permitted to succeed to it, unless it was by virtue of an express provision in the constitution of the *feud* (m).

At length, however, not only descendants in the direct line succeeded in *infinitum*, but collaterals also, without regard to their degree, provided they were descended from, and were of the blood of the first feudatory (n).—See an excellent book on this subject, “An Introduction to the Law of Tenures,” written by sir Martin Wright. Also the first volume of the History of the Emperor Charles the Fifth, by Dr. Robertson. Each of these books in a clear, and the latter in an elegant manner, deduces the origin, and elucidates the principles

(l) Postremo vero lege a Conrado imperatore promulgata (Feud. lib. 5. tit. 1.) ad nepotes ex filiis masculis hoc ipsum productum fuit. Hanneton de jure feud. 139, 140. Cum vero Conradus Romam proficisceretur petitum est a fidelibus, qui in ejus erant servitio, ut lege ab eo promulgata, hoc etiam ad nepotes ex filio producere dignaretur, et ut frater fratri sine legitimo hærede defuncto in beneficio quod eorum patris fuit, succedat. Feud. lib. 1. tit. 1. 19. lib. 5. tit. 1. Spelm. Posthumous Treatise of Feuds, 4. Crag. de jure feud. 21, 22.

(m) Feud. lib. 1. tit. 1. 8, 14. 20. lib. 2. tit. 12, 90.—Crag. de jure feud. 22, 163, 242.

(n) Tandem factum est ut feuda non solum ad descendentes in perpetuum transirent, sed etiam ut ad collaterales, qui ex primo vasallo descendebant, in infinitum continuarentur. Crag. de jure feud. 22, 50, 242, 243, 244. Feud. lib. 1. tit. 1. Schilt. de nat. succession. cap. 1. sect. 3. Spelm. Posthum. Treatise of Feuds, 4, 5. Zasius in usus feud. 46.

ELDEST SON, and not to all the sons; but if there be no sons, then to all the daughters, and become partible.

THE rules and directions of their descents are as follow, viz.

FIRST, for want of sons or nephews, it descends to the daughters; if there be no sons or daughters, or descendants from them, it goes to brothers; and for want of brothers, to sisters;—observing, as before, the difference between lands partible and not partible.—And accordingly the descent runs to the posterity of brothers TO THE SEVENTH DEGREE. If there be no brothers, nor sisters, nor any descendants from

of the feudal system. To these may be added Blackstone's tract on the Law of Descents. Mr. Hume, in his History of England, has slightly, but ingeniously, touched the subject. Gilbert's treatise upon Tenures, and Dalrymple's Essay on Feudal Property, deserve attention. There is also an ingenious "Discourse concerning the Law of Inheritanances in Fee Simple,"—written by Mr. R. Robinson.—Though it cannot be denied, but this "Discourse" places the author in a very respectable point of view; yet it must be confessed, that by attending too much to a favourite system, he is less intelligible than otherwise he would have been.—Sullivan's "Lectures on the Feudal Law, and the Constitution and Laws of England," is a publication of merit, from whence may be derived much necessary information.—With these valuable writings, I would recommend a very ingenious and laborious chart, published by the late Mr. Fearn.—He titles it "An Historical Legi-graphical Chart of Landed Property in England, from the time of the Saxons;" the manifest intent of it being "to distinguish in a manner immediately obvious to sight, the several tenures, as well as the mode of descent, and powers of alienation of lands in England, with the several alterations they have incurred during a course of more than 700 years."

As to the preference of the eldest son to the feud, see Wright's Ten. 175.—And why males were preferred to females, Id. 179, and Sulliv. Lect. xiv. And as to the exclusion of the father from any possibility of succeeding to the son's inheritance, as such, see Wright's Ten. 180. and Blac. Com. 2 v. 212. It is somewhat singular, that in tracing the great lines of the Mexican constitution, an image of feudal policy, in its most rigid form, rises to view.—Its spirit and principles seem to have operated in the new world, in the same manner as in the ancient. Dr. Robert. Hist. Amer. 2 v. 280.

them

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them **WITHIN** the seventh degree, **IT DESCENDS TO THE FATHER**; and if the father be dead, then to the uncles and aunts, and their posterity (as above is said in the case of brothers and sisters); and if there be none, then to the grandfather.

So that, according to their law, the father is **POSTPONED** to the brother and sister, and their issues, but is **PREFERRED** before the uncle. According to the Jewish law, the father is preferred before the brother;—by the Roman law, he succeeds together equally with the brother;—but by the English law, the father **CANNOT** take from his son by an **IMMEDIATE** descent, but may take **AS HEIR TO HIS BROTHER**, who **WAS** heir to his son by collateral descent.

SECONDLY, if lands descended from the part of the father, they could never resort, by a descent, to the line of the mother. But in case of purchases **BY THE SON** who died without issue, for want of heirs of the part of the father, it descended to the heirs of the part of the mother, according to the law of England.

THIRDLY, the son of the **ELDEST** son, who died in the life of the father, is preferred before a **YOUNGER** son, **SURVIVING** his father, as the law stands here now settled; though it had some interruption 4 *Johannis* (d).

FOURTHLY, on equality of degrees, in collateral descents, the male line is preferred before the female.

FIFTHLY, although by the civil law,—*fratres ex utroque parente conjuncti præferuntur fratribus consanguineis tantum vel uterinis*;—yet it should seem by the *Coutumier* of Nor-

(d) Post. note (y). Blac. Com. 2 vol. 220. Sulliv. Lect. xxxvi.

mandy,—*fratres consanguineis et ex eodem patre sed diversâ matre*,—shall take by descent, together with the brothers, **EX UTRIQUE CONJUNCTI**, upon the death of any such brothers. But *quære* hereof, for this seems a mistake. For, as I take it; the half blood **HINDERS THE DESCENT** between brothers and sisters, by their laws, as well as ours.

SIXTHLY, **LEPROSY** was amongst them an impediment of succession. But then it seems it ought to be first solemnly adjudged so by the sentence of the Church.

UPON all this, and much more that might be observed upon the customs of several countries, it appears, that the rules of successions, or hereditary transmissions, have been various in several countries, according to their various laws, customs, and usages.

AND now, after this brief survey of the laws and customs of other countries, I come to the laws and usages of England in relation to descents; and the growth that those customs have successively had, and whereunto they are now arrived.

FIRST, touching hereditary successions. It seems, that according to the ancient British laws, the eldest son inherited **THEIR EARLDOMS AND BARONIES**; for they had great dignities and jurisdictions annexed to them, and were in nature of principalities; but that their **ORDINARY FREEHOLDS** descended to **ALL** their sons. And this custom they carried with them into Wales, whither they were driven. This appears by *Statutum Walliæ*, 12 E. I. and which runs thus, viz.

“*ALITER usitatum est in Wallia quam in Anglia quoad successionem hæreditatis; eo quod hæreditas partibilis est*

“inter

inter hæredes masculos; & a tempore ejus non extiterit memoria partibilis extitit. Dominus rex non vult quod consuetudo illa abrogetur; sed quod hæreditates remaneant partibiles; inter consimiles hæredes, sicut esse consueverunt; & fiat partitio illius sicut fieri consuevit. Hoc excepto bastardi non habeant de cætero hæreditates & etiam quod non habeant purpartes, cum legitimis nec sine legitimis" (c).

WHEREUPON three things are observable, viz. First, that at this time, the hereditary succession of the eldest son was then KNOWN to be the common and usual law in England. Secondly, that the succession of all the sons was the ancient CUSTOMARY LAW among the British in Wales, which by this statute was continued to them. Thirdly, that before this time, bastards were admitted to inherit in Wales, as well as the legitimate children; which custom is thereby abrogated. And although we have but few evidences touching the British laws before their expulsion hence into Wales, yet this usage in Wales, seems sufficiently to evidence THIS to have been the ancient British law [E].

SECONDLY, (c) Vide ante, cap. 9. and note [B] on that chapter.

[E] In the ancient British States, where the whole riches of the people consisted in their herds, the laws of succession were few and simple; the estate of the deceased were divided equally among his sons; if no sons, among his daughters; and if he left no children, among his nearest relations. This was also the rule of succession among the ancient Germans. These nations seem to have had no idea of the rights of primogeniture, or that the eldest son had any title to a larger share of his father's effects than the youngest (a). This rule of division was so inviolably observed by the Germans, and probably by the Britons, that the father, by his will, could not make any other distribution. The laws of succession were much the same in those British States where the lands were divided and cultivated. The lands did not descend to the eldest son, but were equally divided among all the sons;

(a) Tacit. de Mor. German. c. 20.

SECONDLY, as to the times of the Saxons and Danes; their laws, collected by Brompton and Lambard, speak not much concerning the course of descents. Yet it seems that COMMONLY, descents of their ORDINARY lands, at least, except baronies and royal inheritances, descended also to ALL the sons (f). For amongst the laws of king Canutus, in Mr. Lambard (g), is this law, viz. N^o 68. "Sive quis in curia sive morte repentina fuerit intestato mortuus, dominus tamen nullam rerum suarum partem (præter eam quæ jure debetur heredi nomine) sibi assumit: Verum eas

(f) Blackstone says, that the Danes seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance; and, in support of the assertion, cites the very

law of Canute which Hale has transcribed. Blac. Com. 2 v. 213: Hale says the same in his fourth observation on this law.

(g) Fo. 122, 123.

and when any dispute arose about the division, it was determined by the Druids. This law or custom (which was afterwards known by the name of Gavelkind) was observed for ages among the posterity of the ancient Britons (b). It appears plainly in the laws of Hoel Dha, king of Wales in the 10th century. At that time, indeed, the clergy were labouring hard to introduce the doctrine of the common law, which favoured the right of primogeniture; but the municipal laws of Wales were still in favour of the ancient custom. By the ecclesiastical law none succeed to the father in his estate, but his eldest son, lawfully begotten. By the laws of Hoel Dha, it is decreed, that the youngest shall have an equal share of the estate with the eldest (c). Nay, in other parts of these laws, which settle the manner in which estates were to be divided, it appears that the youngest son was more favoured than the eldest, or any of his brothers.—"When the brothers have divided their father's estate amongst them, the youngest brother shall have the best house, with all the office houses; the implements of husbandry; his father's kettle, his ax for cutting wood, and his knife. These three last things the father cannot give away by gift, nor leave by his last will to any but his youngest son; and if they are pledged, they shall be redeemed" (d).

(b) Cæsar. de Bell. Gall. l. 6. c. 13.

(d) Ibid. l. 11. c. 13. p. 139.—

(c) Leges Wallie, l. 11. c. 17. Dr. Henry's Hist. vol. I. p. 222. p. 149.

“iudicio suo uxori, liberis & cognatione proximis iustis
 “(pro suo cuique jure) distributio.”

UPON which law, we may observe these five things, viz.
 “(1) *First*, that the wife had a share; as well of the lands, for
 her dower, as of the goods:

SECONDLY, that, in reference to hereditary successions,
 there then seemed to be little difference between lands and
 goods: for this law makes no distinction:

THIRDLY, that there was a kind of settled right of succe-
 sion, with reference to proximity and remoteness of blood, or
 kin,—*et cognatione proximis pro sui cuique jure.*

FOURTHLY, that, in reference to children, **THEY ALL
 SEEMED TO SUCCEED ALIKE**, without any distinction be-
 tween males and females.

FIFTHLY, that yet the ancestor might dispose of, by his
 WILL, as well lands as goods; which usage seems to have
 obtained here unto the time of Henry II: as will appear here-
 after. *Vide Glanville.*

THIRDLY, it seems that, until the Conquest, the descent
 of lands was at least to ALL the sons alike; and, for aught
 appears, TO ALL THE DAUGHTERS ALSO: and that there
 was NO difference in the hereditary transmission of lands and
 goods, at least in reference to THE CHILDREN (A). **THIS**
appears

(b) The law of the Saxons on altered by the law of Canute
 the continent (which was proba- gives an evident preference of the
 bly brought over hither, and first male to the female sex. “*Pater*
 “*aut*”

appears by the laws of king Edward the Confessor, confirmed by king William I. and recited in Mr. Lambard, folio 167, as also by Mr. Selden in his notes upon Eadmerus, viz. *Leges* 36. tit. *De Intestatorum Bonis*, pag. 184. "Si quis intestatus obierit, liberi ejus hereditatem æqualiter dividunt [F]."

101, should only be how as, which is not the case, but

"aut mater defuncti filio non filie hereditatem relinquent..."

"Quia defunctus non filio sed filie hereditatem relinquit, ad eam omnis hereditas pertinet." Tit. 7. sect.

1. 4. It is possible therefore, in the opinion of Mr. Justice Blackstone, that this preference might be a branch of that imperfect system of feuds, which obtained here before the Conquest; especially as it subsists among the customs of gavelkind, and as, in the charter of law of king Henry the First, it is not (like many Norman innovations) given up, but rather enforced. The true reason (continues the learned commentator) of preferring the males must be deduced from the principles of the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. Black.

[R] The laws of our Anglo-Saxon ancestors directed and regulated the succession of property in a manner very agreeable to the natural rights and desires of mankind. When a father died, and left children, they were his heirs, as being dearest unto him, and most dependent upon him (a). If the children were all sons, the possessions of their common parent were equally, or almost equally, divided amongst them. If they were all daughters, the division was also equal. But when some were sons, and others daughters, it is not certainly known whether the daughters shared equally with the sons or

(a) Fact. de Mor. Germ. c. 101.

Com. 2 v. 114. For the true distinction between proper and improper feuds, see Wright's Ten. cap. 1. *passim*. The succession of all the sons equally to the father, was not only the ancient feudal law, but, as it should seem, the law of England in the time of the Saxons; the relics of which remain in the gavelkind of Kent, Sallis, Led. XIV. and see Robinson's Treat. on Gavelkind, which is an elaborate dissertation on the origin, antiquity and universality of partible descents. The author pursues his subject amongst the Greeks, and the Romans, afterwards amongst most of the modern nations in Europe, and then proceeds to inquire into the state of our own law of descents anterior to the Conquest. For the system of gavelkind, and the properties of this species of tenure, see Wright's Ten. 207, 208, 209, &c.

BUT this equal division of inheritances among all the children was found to be very inconvenient. For

not, in the most ancient times. By the laws of the Saxons on the continent, daughters did not share equally with sons; and this, it is probable, was also the law of those who settled in this island (b); though the law of Canute seems to make no distinction between sons and daughters (c). By the laws of Wales in the tenth century, a daughter received only half the proportion which a son inherited of the father's possessions (d). When a man at his death had no children; his nearest relations were his heirs; which are thus described: "If any one die without children, if his father and mother be alive, they shall be his heirs; if his father and mother are dead, his brothers and sisters shall be his heirs; but if he hath no brothers or sisters, the brothers and sisters of his father and mother shall be his heirs; and so on to the fifth degree, according to proximity of blood (e)." When none appeared to claim a succession, or when they could not make good their claim, the whole fell to the king. Such were the laws of succession, among our Anglo-Saxon ancestors; different in several respects from those which are observed at present, and which were introduced, with many other feudal customs, after the Norman Conquest.

Though these rules of succession seem agreeable to the most natural feelings of the human heart, yet it might often happen, that persons who had no children, or very near relations, might wish to dispose of their possessions to others than those who were pointed out by the law. But this the ancient Germans could not do, because they were strangers to the use of wills and testaments; as probably the Anglo-Saxons were, at their first settlement in this island (f). Those German and northern nations, however, who abandoned their native soils, and founded kingdoms in Italy, France, Spain and Britain, soon became acquainted with, and adopted this method of conveying their estates, which they found practised by the Romans, and other inhabitants of these countries. After the conversion of these nations to Christianity, they were instructed and encouraged in this mode of eluding the strict laws of succession, and conveying their estates by will, for very obvious reasons. Accordingly, we may observe, that the most ancient Anglo-Saxon testaments, which have been preserved and published, are agreeable to the Roman forms, and contain very valuable legacies to the Church, for the benefit of the souls of the testators, and of their ancestors (g). The method of disposing of their possessions by will,

(b) Lindenbrog. p. 476.

(c) Wilkins' Leges Saxon. p. 144.

(d) Leges Wallie, p. 38.

(e) Tacit. de Mor. Germ. c. 20.

Lindenbrog. p. 460. Wilkins' Leges Saxon. p. 266.

(f) Tacit. de Mor. Germ. c. 20.

(g) Hicetili dissertatio epistolaria, p. 50—63.

FIRST, it weakened the strength of the kingdom; for by frequent parcelling and subdividing of inheritances, in process of time they became so divided and crumbled, that there were

agreeable to their inclinations, and for the good of their souls, which was first adopted by kings and great men, soon became so common, and so fatal to the interests of legal heirs, that it was found necessary to lay it under some restraints by positive laws. By a law of Alfred the Great, all persons were restrained from alienating from their natural and legal heirs, estates which had descended to them from their ancestors, if the first purchasers had directed either in writing, or before credible witnesses, that the estates should remain in the family, and descend to their posterity; which sufficiently proves, that entails are very far from being novelties in the laws of England (*b*). A man who had children, was prohibited, by the laws of Wales, from leaving any legacies from his children, except a mortuary to the Church, or a sum of money for the payment of his debts (*c*). But as the ignorance and superstition of the people, the influence and avarice of the clergy, increased, entails, and all other legal restraints, which had been contrived to prevent men from ruining their families to enrich the Church, were removed, and every man was encouraged to leave as much to the Church as possible. "The thirteenth cause," says Muratori, "of the great riches of the Church, was the pious manners of those ancient times, when Fathers and Councils earnestly exhorted all Christians to give, or at least to leave by their testaments, a great proportion of their estates for the redemption of their souls; and those good men who complied with these exhortations, were said to have made Christ one of their heirs. By degrees, there was hardly any man died, without leaving a considerable legacy to the Church; and if any person neglected to make a will and do this, he was esteemed an impious wretch, who had no concern for the salvation of his soul, and his memory was infamous. To wipe off this infamy, it insensibly became a custom for the bishop to make wills for all who died intestate in his diocese, and to leave as much to the Church as the persons themselves should have done, if they had made wills. This good office (as I imagine) was at first done with the consent, and perhaps at the request, of the heirs of the deceased; but in process of time it became an established custom, and acquired the force of a law, particularly in England (*d*). Is it possible, that presumption on the one hand, and simplicity on the other, could be carried to a greater height (*e*)?"

(b) Wilkins' *Leges Saxon.* p. 43.

(c) *Leges Wallie,* p. 76.

(d) Muratori. *Antiq.* t. 5. p. 654.

(e) *Hen. Hist.* 2 v. 283. seq.

few persons of **ABLE** estates left to undergo **PUBLIC** charges and offices.

SECONDLY, it did by degrees bring the inhabitants to a low kind of country living: and **FAMILIES WERE BROKEN**. And the younger sons, which, had they not had those little parcels of land to apply themselves to, would have betaken themselves to trades, or to civil or military, or ecclesiastical employments (*i*), neglecting those opportunities, wholly applied themselves to those small divisions of lands; whereby they neglected the opportunities of greater advantage, of enriching themselves and the kingdom.

AND therefore king William I. having by his accession to the crown gotten into his hands the possessions and demesnes of the crown, and also very many and great possessions of those that opposed him, or adhered to Harold,—disposed of those lands, or great part of them, to his countrymen, and others that adhered to him; and reserved certain honorary tenures, either by baronage, or in knight's service, or grand serjeancy (*k*), **FOR THE DEFENCE OF THE KINGDOM**; and possibly also even at the desire of many of the owners, changed their former tenures into knight's service. Which **INTRODUCTION OF NEW TENURES** was nevertheless not done **WITHOUT CONSENT OF PARLIAMENT**; as appears by the additional laws before mentioned; which king William made by advice of parliament, mentioned by Mr. Selden in his notes on Eadmerus, page 191, amongst which this was one, viz.

(*i*) These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal

constitution was established in England by William the Conqueror. Blac. Com. 2v. 215.

(*k*) See Wright's Tenures; Sulliv. Lect. and note [K] on chapter v.

“STATUIMUS etiam & firmiter præcipimus ut omnes comites barones milites & servientes & universi liberi homines totius regni nostri habeant & teneant se semper in armis & in equis ut decet & oportet, & quod sint semper prompti & bene parati ad servitium suum integrum nobis explendum & peragendum, cum semper opus fuerit, secundum quod nobis de feodis debent & tenentur tenementis suis de jure facere & sicut illis statuimus per commune concilium totius regni nostri, et illis dedimus & concessimus in feodo jure hæreditario.”—— (1).

WHEREBY it appears, that there were two kinds of military provisions; one that was set upon all freeholds by common consent of parliament, and which was usually called *ASSISA ARMORUM*; and another that was conventional, and by tenure, UPON THE INFEUDATION OF THE TENANT, and which was usually called knight's service; and sometimes royal, sometimes foreign service, and sometimes *servitium loricae*.

AND hence it came to pass, that not only by the customs of Normandy, but also according to the customs of other countries, those HONORARY fees, or infeudations, became descendible to THE ELDEST, and not to all the males. And hence also it is, that in Kent—(where the custom of ALL THE MALES taking by descent generally prevails, and who pretend a concession of all their customs by the Conqueror, to obtain a submission to his government, according to that romantic story of their moving wood)—even in Kent itself, those ANCIENT tenements or fees that are held ANCIENTLY by KNIGHT'S SERVICE, are descendible to the ELDEST SON; as Mr. Lambard has observed to my hands, in his *Perambulation*,

(1) Vide ante, vol. i.

bulation, page 533, 553. out of 9 Hen. III. Fitz. Prescription, 63. 26 Hen. VIII. 3. and the statute of 31 Hen. VIII. cap. 3. And yet even in Kent, if gavelkind lands escheat, or come to the crown by attainder or dissolution of monasteries, and be granted to be held by knight's service, or *per baronium*,—the customary descent is NOT changed;—neither can it be, but by act of parliament; for it is a custom **FIXED TO THE LAND**,

BUT those honorary infeudations made in ancient times, especially shortly after the Conquest, did SILENTLY AND SUDDENLY ASSUME THE RULE OF DESCENTS TO THE ELDEST, and accordingly held it. And so, although possibly there were no acts of parliament of those elder times, at least none that are now known of, for altering the ancient course of descents from all the sons to the eldest, yet the use of the neighbouring country might introduce the same usage here, as to those HONORARY possessions,

AND because those honorary infeudations were many, and scattered almost through all the kingdom, in a little time they introduced A PARITY, in the succession of lands of OTHER tenures; as socages, valvasories, &c. So that without question, BY LITTLE AND LITTLE, almost generally in all counties of England (except Kent, who were most tenacious of their old customs, in which they gloried;—and some particular feuds and places where a contrary usage prevailed) the generality of descents or successions, by little and little, AS WELL OF SOCAGE LANDS AS KNIGHT'S SERVICE, went to the ELDEST son, (m) according to the declaration of King Edward I. in the statute of Wales above-mentioned; as will more fully appear by what follows.

(m) See Wright's Ten. 49, 175 | 214, 215, and cap. 3. of this Hist. Sull. Lect. xiv. Blac. Com. 2 v.

In the time of Henry I.—as we find by his seventieth law, it seems that the whole land did NOT descend to the eldest son, but begun to look a little that way, viz. PRIMUM PATRIS FRATRUM PRIMOGENITUS FILIUS HABEAT. And as to collateral descents, that law determines thus: “Si quis sine liberis decesserit pater aut mater ejus in hæreditatem succedat, vel frater vel soror si pater & mater defint; si nec hos, habeat soror patris vel matris, & deinceps in quantum geniculum; qui cum propinquiore in parentela sint hæreditario jure succedant; & dum virilis sexus extiterit & hæreditas ab inde sit, feminea non hæreditetur” (n).

By this law it seems to appear;

FIRST, the eldest son, though he had *jus primogenituræ*, the principal fee of his father's land, yet he had not ALL the land.

SECONDLY, that for want of children, the father or mother inherited before the brother or sister.

THIRDLY, that for want of children, and father, mother, brother, and sister, the land descended to the uncles and aunts TO THE FIFTH GENERATION.

FOURTHLY, that in successions collateral, PROXIMITY of blood was preferred.

FIFTHLY, that the male was preferred before the female, i. e. the father's line was preferred before the mother's, UNLESS THE LAND DESCENDED FROM THE MOTHER, and then the mother's line was preferred.

(n) See cap. vii. and Lambard, ut supra.

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How this law was observed in the interval between Henry the First and Henry the Second, we can give no account of. But the next period that we come to is, the time of Henry II. wherein Glanville gives us an account how the law stood at that time. Vide Glanville, lib. 7. Wherein, notwithstanding it will appear, that there was some UNCERTAINTY AND UNSETTLEDNESS IN THE BUSINESS OF DESCENTS, or hereditary successions, though it was much better polished than formerly, the rules THEN of succession were either in reference to goods, or lands,

As to goods, one third part thereof went to the wife, another third part went to the children, and the other third was left to the disposition of the testator. But if he had no wife, then a moiety went to the children, and the other moiety was at the deceased's disposal. And the like rule if he had left a wife, but no children. Glanv. lib. 2. cap. 29. et lib. 7, cap. 5 (o).

BUT as to the succession of lands, the rules are these,

FIRST, if the lands were KNIGHT'S SERVICE, they generally went to the ELDEST SON; and in case of no sons, then to ALL the daughters; and in case of no children, then to the eldest brother.

SECONDLY, if the lands were SOCAGE, they descended to ALL the sons to be divided; (p) SI FUERIT SOCAGIUM ET
ID

(o) As to the distribution of intestates effects as now established in this kingdom, see 22 and 23 Car. 2. c. 10. 1 Jac. 2. c. 17. Blac. Com. 2 v. 515. 4 v. 408, 474, 479. and a chart illustrative

of the subject, published by Mr. Ed. Parker.

(p) It is mentioned in the Mirror, as a part of our ancient constitution, that knights fees should descend to the eldest son, and socage

IN ANTIQUITY DIVISUM. Only the chief-house was to be allotted to the purparty of the eldest, and a compensation made to the rest in lieu thereof.—“Si vero non fuerit antiquitus divisum, tunc primogenitus secundum quorundam consuetudinem totam hereditatem obtinebit, secundum autem quorundam consuetudinem postnatus filius hæres est.” Glanville, lib. 7. cap. 3. So that although CUSTOM directed the descent VARIOUSLY, either to the eldest, or youngest, or to ALL the sons, yet it seems that at this time, *jus commune*, or common right, spoke for THE ELDEST SON TO BE HEIR, no custom intervening to the contrary.

THIRDLY, as the son or daughter, so THEIR children, *in infinitum*, are PREFERRED in the descent, before the collateral line, or uncles.

FOURTHLY, but if a man had two sons, and the eldest son died in the life-time of his father, HAVING ISSUE a son or daughter, and then the father dies; IT WAS THEN CONTROVERTED, whether the son or nephew should succeed to the father; though THE BETTER OPINION seems to be for the NEPHEW. Glanvil. lib. 7. cap. 3.

FIFTHLY, a bastard could not inherit. Glanv. lib. 7. cap. 13, or 17. And although by the canon or civil law, if *A*. have a son BORN OF *B*. BEFORE marriage, and after *A*. marries *B*.—THIS SON SHALL BE LEGITIMATE AND HERITABLE; yet according to the laws of England then, and ever since used, he was NOT heritable. Glanvil. lib. 7. cap. 15.

age fees should be partible among the male children. Mir. c. 1. sect. 3. and Lord Lyt. Hist. Hen. II. For the definition of a knight's fee, see Sulliv. Lect. pa. 188. As

to fofage, see Somner's Treat. of Gavel. 133, 141. Wright's Ten. 142. and Blac. Com. 2 v. 79. 4 v. 419.

SIXTHLY,

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SIXTHLY, in case the purchaser died without issue, the land descended to the brothers; and for want of brothers, to the sisters; and for want of them, to the children of the brothers or sisters; and for want of them, to the uncles; and so onward ACCORDING TO THE RULES OF DESCENTS AT THIS DAY: and the father or mother were NOT to inherit to the son, but the brothers or uncles, and THEIR children. Glanv. lib. 7. cap. 1 & 4.

AND it seems, that in all things else the rules of descents, in reference to the collateral line, were MUCH THE SAME AS NOW. As namely, that if lands descended of the part of the father, it should NOT resort to the part of the mother, or *converso*. But in the case of PURCHASERS, for want of heirs of the part of the father, IT RESORTED TO THE LINE OF THE MOTHER. And the nearer and more worthy of blood were preferred. So that if there were any of the part of the father, though never so far distant, it hindered the descent to the line of the mother, though much nearer.

BUT in those times it seems there were two impediments of descents, or hereditary successions, which do NOT NOW obtain, viz.

FIRST, leprosy; if so adjudged by sentence of the Church. This indeed, I find not in Glanville; but I find it PLEADED AND ALLOWED in the time of king John; and thereupon the land was adjudged from the leprous brother to the sister. *Pasch. 4 Johannis.*

SECONDLY, there was another curiosity in law, and it was wonderful to see how much and how long it prevailed. For we find it in use in Glanville, who wrote *temp.* Henry II.—in Bracton, *temp.* Henry III.—in Fleta, *temp.* Edward I. and in the broken year of 13 Edward I. Fitzh. Avowry 235.—

“ *Nemo*

"*Nemo potest esse tenens & dominus, & homagium repellit perquisitum.*"—And therefore if there had been THREE brothers, and the eldest brother had enfeoffed the second, RESERVING HOMAGE,—AND HAD RECEIVED HOMAGE, and then the second had died without issue;—the land should have descended to the YOUNGEST brother, and not to the eldest brother, *quia homagium repellit perquisitum*, as it is here said: for he could not pay homage to himself. Vide for this, Bracton, lib. 2. cap. 30. Glanvil. lib. 7. cap. 1, Fleta, lib. 6. cap. 1,

BUT at this day the law is ALTERED, and so it has been, for aught I can find, ever since 13 Edw. I.—Indeed, it is ANTIQUATED, rather than altered, and the fancy upon which it was grounded, has appeared trivial. For if the eldest son enfeoff the second, reserving homage, and that homage paid, and then the second son dies without issue, it will descend to the eldest AS HEIR, and the seignior is extinct. It might indeed have had some colour of reason to have examined, "whether he might not have WAIVED the descent, in case "his services had been more beneficial than the land."—But there could be little reason from thence to exclude him from the succession. I shall mention no more of this impediment, nor of that of leprosy, for that they both are vanished and antiquated long since. As the law now is, NEITHER OF THESE ARE ANY IMPEDIMENT OF DESCENTS,

AND now, passing over the time of king John and Richard I.—because I find nothing of moment therein on this head; (unless the usurpation of king John upon his eldest brother's son, which he would fain have justified, by INTRODUCING a law of preferring the younger son before the nephew, descended from the elder brother: but this pretension could no way justify his usurpation, as has been already shewn in the time

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time of Henry II. (9)—next, I come to the time of Henry III. in whose time the tractate of Bracton was written: And thereby (in lib. 2. cap. 30. & 31. and lib. 5.) it appears, that there is solittle variance, as to point of descents; between the law as it was taken when Bracton wrote, and the law as afterwards taken in Edward the First's time, when Britton and Fleta wrote, that there is very little difference between them; as may easily appear by comparing Bracton *ubi supras* & Fleta, lib. 5. cap. 9. lib. 6. cap. 1, 2. The latter seem to be only transcripts, or abstracts of the former. Wherefore I shall set down the substance of what both say, and thereby it will appear, that the rules of descents in Henry the Third and Edward the First's time were very much one.

FIRST, at this time the law seems to be unquestionably SETTLED, that the ELDEST son was, of common right, HEIR, not only in cases of knight service lands, but also of socage lands; unless there were a special custom to the contrary, as in Kent and some other places. And so that point of the common law was fully settled (r).

SECONDLY, that all the descendants, *in infinitum*, from any person that had been heir, if living, were inheritable JURE REPRESENTATIONIS; as the descendants of the son, of the brother, of the uncle, &c. And also,

THIRDLY, that the eldest son dying in the life-time of the father, HIS son, or issue, was to have the preference AS HEIR, to the father, before the younger brother; and so the doubt in Glanville's time was settled. Glanvil. lib. 7. cap. 3. "Cum
" quis autem moriatur habens filium postnatum, & ex primo-
" genito filio præmortuo nepotem, magna quidem juris dubi-

(9) Ante, page 93. See Blac.
Com. 2 v. 220. Sulliv. Lect.

(r) Blac. Com. 2 v. 215.

THE HISTORY OF THE MOO

"tatio solet esse inter illorum. preferendus sit alii in illa suc-
"cessioni, scilicet, utrum filius aut nepos?"

FOURTHLY, the father or grandfather could not by law
inherit **IMMEDIATELY** to the son.

FIFTHLY, leprosy, though it were an exception to a plain-
tiff, because he ought **NOT** to converse in the courts of law,
(as Bracton, lib. 5. cap. 20.) yet we no where find it to be an
impediment of a descent (s).

So that, upon the whole matter, for any thing I can observe
in them, the rules of descents **THEN** stood settled in **ALL**
points, as they are **AT THIS DAY**; except some **FEW** matters,
which yet were soon after settled, as they now stand, viz.

FIRST, that impediment or hindrance of a descent from
him that did homage to him that received it, seems to have
been yet in use; at least till 13 Edw. I. and in Fleta's time,
for HE puts the case and **ADMITS** it.

SECONDLY, whereas both Bracton and Fleta agree, that
HALF BLOOD to him that is a **PURCHASER**, is an impediment
of a descent; yet in the case of a descent from **THE COMMON**
ANCESTOR, half blood is no impediment. As for instance—
A. has issue **B.** a son and **C.** a daughter by one venter, and **D.**
a son by another venter: if **B.** purchases in fee and dies with-
out issue, it shall descend to the sister, and not to the brother of
the half blood. But if the land had descended from **A.** to **B.**
and he had entered and died without issue, it was a doubt in
Bracton and Britton's time, whether it should go to the
younger son, or to the daughter? But the law is since settled,

(s) See Fitzherbert, on the writ "de leproso amovendo,"—234. D.

that IN BOTH CASES IT DESCENDS TO THE DAUGHTER.—

“ Et seilina facit stipitem & primum gradum. Et possessio
“ fratris de feodo simplici facit sororem esse hæredem.”

THUS upon the whole it seems, that abating those small and
inconsiderable variances, the states and rules of descents as
they stood in the time of Henry the Third, or at least in the time
of Edward the First, were reduced to their full complement and
perfection; and vary nothing CONSIDERABLY from what they
are at this day, and HAVE CONTINUED EVER SINCE THAT
TIME.

I SHALL therefore set down the state and rule of descents IN
FEA-SIMPLE, as it stands at this day; without meddling with
particular limitations of entails of estates; which VARY the
course of descents, in some cases, from the common rules of
descents or hereditary successions. And herein we shall see
what the law has been and continued, touching the same, ever
since Bracton's time, who wrote in the time of Henry the
Third, now above four hundred years since; and by that we
shall see what alterations the succession of time has made
therein.

AND now to give a short scheme of the rules of descents,
or hereditary successions, of the LANDS of subjects, AS THE
LAW STANDS AT THIS DAY, and has stood for above four
hundred years past, viz.

ALL possible hereditary successions may be distinguished
into these three kinds; viz. either,

FIRST, in the descending line, as from father to son or
daughter, nephew or niece, i. e. grandson or granddaughter.
Or,

SECONDLY,

SECONDLY, in the collateral line, as from brother to brother or sister, and so to brother and sisters children. Or,

THIRDLY, in an ascending line, either DIRECT, as from son to father, or grandfather, (which is NOT admitted by the law of England) [G]; or in the TRANSVERSAL line, as to the uncle

[G] The reasons given for excluding lineal ascent are first, that fathers and mothers are not of the blood of their children; secondly, that the exclusion is agreeable to the Jewish law, as prescribed to Moses by God himself; and thirdly, that it tends to avoid confusion and diversity of opinions in the case of descents, of which the allowance of lineal ascension by the *civil* law is said to be the occasion. 3 Co. 40, Ratcliff's case. Sir Edward Coke himself controverts the first of these reasons, by the words of Littleton in c. 1. section 3 (a); and by the case of administration, in which the father or mother is preferred as *nearest of blood* to their children; and also by the case of a remainder to the sons *nearest of blood*, under which description the father is entitled to take by purchase. But as to the two other reasons, Coke rather appears to adopt them. However, neither of them seem satisfactory. The inference from God's precept to Moses is unwarranted, unless it can be shewn, that it was promulgated as a law for mankind in general, instead of being, like many other parts of the Mosical law, a rule for the direction of the Jewish nation only. Besides, by the Jewish law, the father did succeed to the son in exclusion of his brothers, unless one of them married the widow of the deceased, and raised up seed to him. See Blackstone's Law Tracts, v. 1. p. 182, 183, 184, and Seld. de Success. Ebræor. c. 12. there cited. The argument from the supposed confusion and uncertainty which might arise, if lineal ascent should be permitted, is not less liable to objection; because lineal ascent might be governed by the same rules as lineal descent; and what is the difference between the two, that should create more confusion and uncertainty in the one case than in the other? Our modern writers account for our disallowance of lineal ascent in a very different way; and, according to them, it in a great measure originated from the nature of ancient feudal grants, which, like estates tail, being confined to the first feudatory and his descendants, necessarily excluded his father and mother, and all paramount to them, and also his collateral relations. How this rule in *practice* became extended, so as to exclude lineal ascent *universally*, without confining it to the cases to which the feudal reason for the

(a) Co. Lit. 11. a. b.

or aunt, great-uncle or great-aunt, &c. And because this line is again divided into the line of the father, or the line of the mother; this TRANSVERSE ASCENDING SUCCESSION

rule is applicable, and yet at the same time is so construed, as to let in all collateral relations, and even the father himself collaterally, and by the medium of others, is not now very easy to explain; though even this has been attempted. See Wright's Tenures, 180. and Blackstone's Law Tracts, v. 1. p. 183. oct. ed. See also a learned note on the subject, in Littleton *avec Observat. par M. Howard*. This edition of Littleton is in 2 vol. quarto, and was published at Rouen in 1766.—Hargrave's edit. of Co. Lit. note 1. p. 11.

Bracton gives the following quaint reason for the exclusion of lineal ascent—"Descendit itaque jus quasi ponderosum quod cadens deorsum recta linea vel transversali, et nunquam reascendit, &c. (b)." This reason is also adopted by sir Edward Coke (c). Hence in the opinion of our ancient lawyers, the descent of lands was regulated according to the laws of gravitation. This reason has been long since exploded; and others, which have been drawn from the history of the rule itself, from the principles of the feudal system, are now admitted, as conclusive, on the subject. For which see Wright's Ten. 180. Sulliv. Lect. xiv. Blac. Com. 2 v. 208. The Saxons were perpetually loading descents with services, and of consequence were led to direct those descents, where those services were likely to be maintained with the greatest vigour and advantage: this is the fairest reason, and looks likely to be the true one, why the father cannot succeed (in this kingdom) into the landed estate of his son; because he cannot be supposed in a condition to perform the service that is expected from it (d). "In prohibiting the lineal ascent, the common law," says sir Edward Coke, "is assisted with the law of the Twelve Tables (e)." See Table 5. l. *de successione ab intestato*. But neither in this, nor in any other part of the Twelve Tables, do I see (adds Mr. Hargrave, in his comment on Coke) any thing to exclude lineal ascent; and as I have not met with any book on the Roman law, in which such exclusion is mentioned, I conclude, that Coke is mistaken in his idea of our laws conforming to the law of the Twelve Tables. The mother was indeed excluded; but it was not because the law of the Twelve Tables did not permit lineal ascent, but on account of her sex, that law preferring the *agnati*, or those related through males, and excluding the *cognati*, or those related through females. See 1 Inst. 3. Princ. and Harg. note 2. on Co. Lit. 11. 2.

(b) L. 2 c. 29.

(c) 1 Inst. 11. 2.

(d) Tay. Elem. Civ. Law, 544.

(e) 1 Inst. 11. b.

is either in the line of the father, grandfather, &c. ON THE BLOOD OF THE FATHER; or in the line of the mother, grandmother, &c. ON THE BLOOD OF THE MOTHER. The former are called AGNATI, the latter COGNATI. I shall therefore set down a scheme of pedigrees, as high as great-grandfather and great-grandmothers grand-fires, and as low as great-grandchild; which nevertheless will be APPLICABLE TO MORE REMOTE SUCCESSIONS with a little variation; and will explain the whole nature of descents, or hereditary successions.

THIS pedigree, with its application, will give a plain account of all hereditary successions, under their several cases and limitations, as will appear by the following rules; taking our mark, or epocha, from the FATHER and MOTHER.

BUT first, I shall premise certain GENERAL RULES, which will direct us much in the course of descents, as they stand here in England, viz.

FIRST, in descents, the LAW PREFERS THE WORTHIEST OF BLOOD (*t*). As,

1st, IN all descents IMMEDIATE, the male is preferred before the female, whether in successions descending, ascending, or collateral. Therefore in descents, the son inhe-

(*t*) Or, in other words, sons are admitted before daughters.—As, if Caius hath two sons, *A.* and *B.* and two daughters, *C.* and *D.* and dies;—first *A.* and (in case of his death without issue) then *B.* shall be admitted to the succession, in preference to both the daughters. Blac. Com. 2 v. 213.

The PATERNAL Line.		The MATERNAL Line.	
Tritavus, or Great-Grandfather's Great-Grandfather.		Tritavia, or Great-Grandmother's Great-Grandmother.	
Atavus, or Great-Grandfather's Grandfather.		Atavia, or Great-Grandmother's Grandmother.	
Abavus, or Great-Grandfather's Father.		Abavia, or Great-Grandmother's Mother.	
Proamita Magna, Gr. Great-Aunt.	Propatrus Magnus, Gr. Great-Uncle.	Proavia, or Gr. Grandfather.	Proavunculus, Gr. Great-Uncle.
Amitta Magna, Gr. Great-Aunt.		Promatertera Magna, Gr. Great-Aunt.	
Patruus Magnus, Gr. Great-Uncle.		Avia, or Grandmother.	
Avunculus Magnus, Gr. Great-Uncle.		Matertera Magna, Gr. Great-Aunt.	
Amitta, or Aunt.		Avunculus, Mother's Brother.	
Soror, his Sister.		Matertera, Mother's Sister.	
Filius Primus, eldest Son.		Confobrinus, A Mother's Sister.	
Nepos, Neptis, Nephew. Niece.		Confobrina, A Mother's Sister's Daughter.	
Fratres, his Brothers.		Confobrinus, A Mother's Brother's Son.	
Nepos, Neptis, Nephew. Niece.		Confobrina, A Mother's Brother's Daughter.	

Note, The descendants from all these fix in the next degree, if Male is called Pro-nepos, if Female Pronepitis, i. e. Great Grandson, or Great Grand-daughter.

rights and excludes (u) the daughter: The brother is preferred before the sister; the uncle before the aunt.

2dly, IN all descents IMMEDIATE, — the DESCENDANTS FROM MALES ARE TO BE PREFERRED BEFORE THE DESCENDANTS FROM FEMALES. Hence it is, that the daughter of the eldest son is preferred, in descents from the father, before the son of the younger son; and the daughter of the eldest brother, or uncle, is preferred before the son of the younger; and the uncle, nay, the great-uncle, i. e. the grandfather's brother, shall inherit before the uncle of the mother's side.

SECONDLY, in descents, THE NEXT OF BLOOD IS PREFERRED BEFORE THE MORE REMOTE, though equally or more worthy. And hence it is,

1st, THE sister of the WHOLE blood is preferred, in descents, before the brother of the HALF blood; because she is more strictly joined to the brother of the whole blood, VIZ. BY FATHER AND BY MOTHER, than the half brother; though otherwise he is the more worthy (x).

SECONDLY,

(u) But our law does not extend a total exclusion of females; — it only postpones them to males; for, though daughters are excluded by sons, yet they succeed before any collateral relations; our law steering a middle course between the absolute rejection of females, and the putting them on a footing with males. Blac. Com. 2 v. 214.

(x) The exclusion of the half

blood by our law is variously accounted for. — Sir Martin Wright considers it as a consequence of the rules established for restricting the succession to the descendants of the first feudatory, in conformity with the strict notion of feuds. Wright's Ten. 184. See also Blac. Law Tracts, v. 1. oct. 213. and his Com. 2 v. 224 to 234. where the feudal law is explained more at large, though the

2dly, BECAUSE the son, or daughter, being nearer than the brother; and the brother, or sister, than the uncle;—the son or daughter shall inherit before the brother, or sister, and they before the uncle.

3dly, THAT yet the father or grandfather, or mother or grandmother, in a DIRECT ascending line, shall NEVER succeed IMMEDIATELY the son or grandchild; but the father's brother, or sisters, shall be preferred before the father himself; and the grandfather's brother, or sisters, before the grandfather. And yet upon a strict account, the father is NEARER of blood to the son, than the uncle, yea than the brother; for the brother is of the blood of the brother, both deriving from the same parent, the common fountain of both their blood. And therefore the father, at this day, is preferred IN THE ADMINISTRATION OF THE GOODS, before the son's brother of the whole blood; and a remainder limited PROXIMO DE SANGUINE of the son,

the author admits that the practice goes much farther than the principle will warrant.—Some insist, that the reason why the brothers by different venters cannot inherit to each other, is the aversion our Saxon ancestors had to second marriages, which they are said to have deemed, at best, but a permitted fornication. But this unfavourable idea of the *vota iterata* was not peculiar to the Saxons, or to any other descendants of the ancient Germans. Hargrave. See Tayl. Elem. Civ. L. 294. Lit. sect. 6. and Coke's comment—But daughters by different femes, tho' they can-

not inherit to each other, may inherit together to their father, because the descent is IMMEDIATE from the father. Rob. disc. on Inher. 37. Bro. Abr. Descent, pl. 20. 1 Ro. Abr. 627. As to sir Edward Coke's explanation of the term "*whole blood*" in 1 Inst. 14. a. see 1 Sid. 200. and the argument of sir Matthew Hale in the case of Col-lingwood and Pace, 1 Vent. 413. See also 2 P. Wms. 667. Propinquior excludit propinquum, & propinquus remotum, & remotus remotiorem. 1 Inst. 10. b. 14. seq.

shall vest in the father, before it shall vest in the uncle.
Vide Littleton, lib. 1. fol. 8, 10.

THIRDLY, that all the descendants from such a person as by the laws of England might have been heir to another, HOLD THE SAME RIGHT BY REPRESENTATION, as that common root from whence they are derived (y). And therefore,

1st, THEY are in law, in the SAME right of worthiness and proximity of blood, as their root, THAT MIGHT HAVE BEEN HEIR, was, in case he had been living. Hence it is, that the son or grandchild, whether son or daughter of the eldest son, succeeds before the younger son; and the son or grandchild of the ELDEST brother, before the youngest brother: and so through all the degrees of succession, BY THE RIGHT OF REPRESENTATION, THE RIGHT OF PROXIMITY IS TRANSFERRED FROM THE ROOT TO THE BRANCHES, and gives them the same preference as the next and worthiest of blood,

2dly, THIS right transferred by representation, is INFINITE AND UNLIMITED, in the degrees of those that descend from the represented. For *filius* the son, *nepos* the grandson, *abnepos* the great-grandson, and so *in infinitum*, ENJOY THE SAME PRIVILEGE OF REPRESENTATION AS THOSE FROM WHOM THEY DERIVE THEIR PEDIGREE HAD, whether it be in descents lineal or transversal; and therefore the great-grandchild of the eldest brother, whether it be son or daughter, shall be preferred before the younger bro-

(y) That is, they stand in the same place as the person himself would have done, had he been living.

ther.

ther; because though the female be LESS worthy than the male, yet she stands in right of representation of the eldest brother, who was more worthy than the younger (z). And upon this account it is,

3dly, THAT if a man have TWO daughters, and the eldest dies in the life of the father, leaving six daughters, and then the father dies; THE YOUNGEST DAUGHTER SHALL HAVE AN EQUAL SHARE WITH THE OTHER SIX DAUGHTERS; because they stand in representation and stead of their mother, who could have had but a MOIETY.

FOURTHLY, that by the law of England, without a special custom to the contrary, THE ELDEST son, or brother, or uncle, EXCLUDES THE YOUNGER. And the males in an equal degree do not all inherit. But ALL THE DAUGHTERS, whether by the same or divers venters, do INHERIT TOGETHER TO THE FATHER.—And all the sisters, BY THE SAME VENTER, do inherit to the brother (a).

(z) And these representatives take neither more nor less, but just so much as their principals would have done.—This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. Blac. Com. 2 v. 217. The Jewish succession was after the same manner.—Seld. de Succ. Ebr. c. 1.—Though the Roman somewhat differed.—Nov. 110. 2. 3, Inst. 3. 1. 6, But see parti-

cularly Blac. Com. 2 v. 218.

(a) As if Caius hath two sons *A.* and *B.* and two daughters *C.* and *D.* and dies;—*A.* his eldest son shall alone succeed to his estate, in exclusion of *B.* the second son and both the daughters; but, if both the sons die without issue before the father, the daughters *C.* and *D.* shall both inherit the estate, as coparceners, Lit. Sec. 5. As to this right of primogeniture in males, see Blac. Com. 2 v. 214.

FIFTHLY, that THE LAST ACTUAL SEISIN IN ANY ANCESTOR, MAKES HIM, AS IT WERE, THE ROOT OF THE DESCENT, equally to many intents, as if he had been a purchaser : and therefore he that cannot, according to the rules of descents, derive his succession from him that was last actually seised, though he might have derived it from some precedent ancestor, shall NOT inherit (b). And hence it is, that where lands descend to the eldest son from the father, and the son enters and dies without issue ; his sister of the whole blood shall inherit AS HEIR to the brother, and not the younger son of the HALF BLOOD ; because he cannot be heir to the brother of the half blood (c). But if the eldest son had survived the father, and died BEFORE ENTRY, the youngest son should inherit, AS HEIR TO THE FATHER, and not the sister ; because he is heir to the father, who was LAST ACTUALLY SEISED. And hence it is, that though the uncle is preferred before the father, in descents to the son ; yet if the uncle enter after the death of the son, and die without issue, the father shall inherit to the uncle, QUIA SEISINA FACIT STIPITEM.

SIXTHLY, that WHOSOEVER DERIVES A TITLE to any land, MUST BE OF THE BLOOD TO HIM THAT FIRST PURCHASED IT (d). And this is the reason why, if the son PURCHASE lands and dies without issue, it shall descend to the heirs of the part OF THE FATHER ; and if he has none, then to the

(b) "A man (saith sir Edward Coke) that claimeth as heir in fee-simple, to any man by descent, must make himself heir to him that was last seised of the actual freehold and inheritance." 1 Inst. 11. b. See also 8 Co. 36. a. where 11 Hen. IV. 11. and 40 E. III. 9. are cited to prove this doctrine. And 1 Inst. 14. b. 15.

b. W. Jo. 361. Blac. Law Tr. oct. v. 1. 120. and Blac. Com. 2 v. 208 to 212. 227, 228.

(c) See note (x).

(d) The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether by sale, gift, or any other mode, except only that of descent.

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heirs on the part of the mother: because though the son has both the blood of the father and of the mother in him, yet he is of the whole blood of the mother, and the consanguinity of the mother are CONSANGUINEI COGNATI of the son (c).

AND of the other side, if the father had purchased lands, and it had DESCENDED to the son, and the son had died without issue, and without any heir of the part of THE FATHER,—it should NEVER have descended in the line of the MOTHER, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity TO THE FATHER, who was THE PURCHASER. But if there had been none of the blood of the grandfather, yet it might have resorted to the line of the GRANDMOTHER; because her *consanguinei* were as well of the blood of the father, as the mother's consanguinity is of the blood of the son. Consequently also, if the GRANDFATHER had purchased lands, and THEY HAD DESCENDED to the father, and from him to the son; if the son had entered and died without issue, HIS father's brothers, or sisters, or their descendants; or, for want of them, HIS great-grandfather's brothers, or sisters, or their descend-

(c) Lit. Sec. 4. passim, and Co. Lit. 12. a. with Hargrave's notes.—For an explication of the principle which governs this rule of descents, see Blac. Com. 2 v. 220 to 223. Sir Edw. Coke, in 1 Inst. 13. a. says, "When lands DESCEND from the part of the father, the heirs of the part of the mother shall never inherit."—But if the eldest son PURCHA-

ses land, and it descends to the youngest son, and HE dies without heir of the part of the father, it shall descend to the heir on the part of the mother, because they have one and the same mother." Harg. n. 5. on Co. Lit. 13. a. He cites Hal. MSS.—But see post. the sixth rule of transversal ascending descents.

ants;

ants; or, for want of them, ANY OF THE CONSANGUINITY OF THE GREAT-GRANDFATHER, or brothers or sisters of the great-grandmother, or their descendants, might have inherited. FOR THE CONSANGUINITY OF THE GREAT-GRANDMOTHER WAS THE CONSANGUINITY OF THE GRANDFATHER. But none of the line of the mother, or grandmother, viz. the grandfather's wife, should have inherited, for that they were NOT of the blood of the first purchaser. And the same rule, *à converso*, holds in purchases in the line of the mother, or grandmother. They shall always keep in the SAME line that the first purchaser settled them in,

BUT it is NOT necessary, that he that inherits be always heir TO THE PURCHASER. It is sufficient if he be of HIS BLOOD, and HEIR TO HIM that was LAST SEISED. The father purchases lands which descended to the son, who dies without issue; they shall never descend to the heir of the part of the son's MOTHER. But if the son's GRAND-MOTHER has a brother, and the son's GREAT-GRAND-MOTHER hath a brother, and there are NO OTHER kindred, they shall descend to the GRAND-MOTHER'S BROTHER. And yet, if the father had died without issue, HIS GRAND-MOTHER'S BROTHER should have been preferred before his mother's brother; because the former was heir OF THE PART OF HIS FATHER, though a female, and the latter was only heir of the part of his mother. But where the son is ONCE SEISED, and dies without issue, HIS GRAND-MOTHER'S BROTHER IS TO HIM HEIR OF THE PART OF HIS FATHER; and being nearer than his great-grandmother's brother, is preferred in the descent.

BUT note, this is always intended so long as the line of descent is not broken. For if the son ALIEN those lands, and then

then REPURCHASE them again in FEE; then the rules of descents are to be observed, as if he were the original PURCHASER; and as if it had been in the line of the father or mother.

SEVENTHLY, in all successions, as well in the line descending, transveral, or ascending, THE LINE THAT IS FIRST DERIVED FROM A MALE ROOT, HAS ALWAYS THE PREFERENCE.

INSTANCES whereof in the line DESCENDING, &c. viz.

A. has issue two sons, *B.* and *C.*—*B.* has issue a son and a daughter, *D.* and *E.*—*D.* the son, has issue a daughter *F.*—and *E.* the daughter, has issue a son *G.*—Neither *G.* nor any of HIS descendants, shall inherit, so long as there are ANY descendants from *D.* and *E.*—and neither *F.* the daughter, nor any of HER descendants, shall inherit, so long as there are ANY descendants from *D.* the son, whether they be male or female.

So in descents COLLATERAL, as brothers and sisters; the same instances applied thereto, evidence the same conclusions.

BUT in successions in the line ASCENDING, there must be a fuller explication; because it is darker and more obscure. I shall therefore set forth the whole method of TRANSVERSAL ASCENDING DESCENTS, under the eight ensuing rules, viz.—

FIRST, if the son purchases lands in fee-simple, and die^s without issue, those of the male line ascending, USQUE INFINITUM, shall be preferred in the descent, ACCORDING TO THEIR PROXIMITY OF DEGREE TO THE SON; and therefore, the father's brothers and sisters, and their descendants,

ants, shall be preferred before the brothers of the grandfather and their descendants. And if the father had no brothers nor sisters, the grandfather's brothers and their descendants, and for want of brothers, HIS sisters and their descendants, shall be preferred before the brothers of the great-grandfather. For although by the law of England the father or grandfather cannot IMMEDIATELY inherit to the son, yet the direction of the descent, to the COLLATERAL ASCENDING LINE, is as much, as if the father or grandfather had been by law inheritable : and therefore, as in case the father had been inheritable, and should have inherited to the son before the grandfather, and the grandfather, before the great-grandfather, and consequently if the father had inherited and died without issue, his eldest brother and his descendants should have inherited before the younger brother and his descendants ; and if he had no brothers, but sisters, the sisters and their descendants should have inherited before his uncles, or the grandfather's brothers and their descendants.—So though the law of England EXCLUDES the father from inheriting, yet it substitutes and directs the descent as it should have been, had the father inherited ; viz. IT LETS IN THOSE FIRST THAT ARE IN THE NEXT DEGREE TO HIM (f).

SECONDLY, the second rule is this: That the line of the part of the MOTHER shall never inherit, AS LONG AS THERE ARE ANY, THOUGH NEVER SO REMOTE, OF THE LINE OF THE PART OF THE FATHER. And therefore, though the mother has a brother, yet if the *avunculus* or *avia patris*—i. e. the great-great-grandfather, or great-great-

(f) Year-book M. 12 Edw. 2. Brook, *ibid.* 38. Blac. Com. IV, 14. Fitz. Abr. tit. Descent 2 v. 223.

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grandmother of the father—has a brother or a sister, he or she shall be preferred, and exclude the mother's brother, though he is much nearer.

THIRDLY, but yet farther. The **MALE** line of the part of the father **ASCENDING**, shall, **IN ÆTERNUM**, exclude the female line of the part of the father ascending; and therefore in the case proposed, of the son's **PURCHASING** lands and dying without issue, the sister of the father's grandfather, or of his great-grandfather, and so, **IN INFINITUM**, shall be preferred before the **FATHER'S MOTHER'S BROTHER**; tho' the father's mother's brother be a male, and the father's grandfather or great-grandfather's sister be a female, and more remote; because **SHE IS OF THE MALE LINE**, which is more worthy than the female line, though the female line be also of the blood of the father.

FOURTHLY, but as in the male line ascending, **THE MORE NEAR** is preferred before the more remote; so in the female line **DESCENDING** (*g*),—so it be **OF THE BLOOD OF THE FATHER**,—it is preferred before the more remote. The son therefore **PURCHASING** lands, and dying without issue; and the father, grandfather, and great-grandfather, and so upward, **ALL THE MALE LINE BEING DEAD**, without any brother or sister, or **ANY DESCENDING** from them;—but the father's mother has a sister or brother; and also the father's grandmother has a brother, and likewise the fa-

(*g*) Qu. if it should not be "in the female line" **ASCENDING**.—See Plowd. 450. in the case of Clere and Brook. And

note Hale, in the conclusion of this fourth rule of "transversal **ASCENDING** descents."

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ther's great-grandmother has a brother:—though it is true, that ALL THESE ARE OF THE BLOOD OF THE FATHER; and though the very remotest of them shall EXCLUDE the son's mother's BROTHER; and though it be also true, that the great-grandmother's blood has passed through more males of the father's blood, than the blood of the grandmother, or mother of the father; yet, in this case, THE FATHER'S MOTHER'S SISTER SHALL BE PREFERRED before the father's grandmother's brother,—or the great-grandmother's brother:—because THEY are all in the FEMALE line, viz. *cognati* and not *agnati*; and the father's mother's sister is the NEAREST; and therefore shall have the preference; as well as in the male line ASCENDING, the FATHER's brother, or HIS sister, shall be preferred before the grandfather's brother.

FIFTHLY, but yet in the last case, where the son purchases lands and dies without issue, and without any heir on the part of the grandfather, the lands shall descend to the grandmother's brother or sister, as heir on the part of his father: yet if the FATHER had PURCHASED this land and died, and it DESCENDED to his son, who died without issue; the lands should NOT have descended to the father's mother's brother or sister, for the reasons before given in the third rule: but for want of brothers or sisters of the grandfather, great-grandfather, and so upwards, in the male ASCENDING line, it should descend to the father's grandmother's brother, or sister, WHICH IS HIS HEIR OF THE PART OF HIS FATHER;—who should be preferred before the father's mother's brother; who is, in truth, the heir OF THE PART OF THE MOTHER of the purchaser; though the next heir of the part of the father of him that LAST DIED SEISED. And therefore, as if the father that was the purchaser had died without issue, the heirs of the part of the father, whether of the male or female line, should have been preferred before the heirs of the part of the mother; so the son, WHO STANDS

NOW

NOW IN THE PLACE OF THE FATHER, and inherits to him primarily, in his father's line, dying without issue, the same devolution and hereditary succession should have been, as if his father had immediately died WITHOUT ISSUE;—which should have been to his grandmother's brother, as heir OF THE PART OF THE FATHER, though by the female line; and not to his mother's brother, who was only heir of the part of his MOTHER, and who is not to take till the father's line both male and female BE SPENT.

SIXTHLY, if the son PURCHASES lands and dies without issue, and IT DESCENDS to any heir of the part of the father; THEN if the line of the father, AFTER ENTRY AND POSSESSION, fail, it shall NEVER return to the line of the mother (b); though in the FIRST instance, or first descent from the son, IT MIGHT have descended to the heir of the part of the mother: for by this descent and seisin, IT IS LODGED IN THE FATHER'S LINE, to whom the heir of the part of the mother can NEVER derive a title, as heir, but it shall rather escheat. But if the heir of the part of the father had NOT ENTERED, and THEN THAT line had failed, it might have descended to the heir of the part of the mother, AS HEIR TO THE SON;—to whom immediately, for want of heirs of the part of the father, it might have descended.

SEVENTHLY, and upon the same reason, if it had ONCE DESCENDED to the heir of the part of the father of the grandfather's line, and THAT heir had ENTERED, it should never descend to the heir of the part of the father of the grandmother's line; because the line of the grandmother was NOT of the blood, or consanguinity of the line of the grandmother's side (i).

(b) But see note (c) ante, page 321. | "grandmother's," but it should be "grandfather's side."

(i) All the editions have it

EIGHTHLY,

EIGHTHLY, if for default of heirs of the purchaser, of the part of the father, the lands DESCEND to the line of the mother;—the heirs of the mother, of the part of HER FATHER'S SIDE, shall be preferred in the succession, before her heirs of the part of her MOTHER'S side;—because they are **THE MORE WORTHY**.

AND thus the law stands in point of descents, or hereditary successions, in England, at this day; and has so stood and continued for above four hundred years past; as, by what has before been said, may easily appear. And note, the most part of the eight rules and differences above specified and explained, may be collected out of the resolutions in the case of *Clere v. Brook*, &c. in *Plowden's Commentaries*, folio 444 (k).

BUT

(k) See *Blackstone's* state of this case, *Com. 2 v. 238*, who controverts the opinion which *Mr. Matthew Hale* adopted, in consequence of the doctrine laid down by justice *Manwoode* in that case.

In the year 1779, an anonymous pamphlet was published, intitled, "Remarks on the Laws of Descent; and on the Reasons assigned by *Mr. Justice Blackstone*, for rejecting in his Table of Descent, a Point of Doctrine laid down in *Plowden*, *Lord Bacon*, and *Hale*."—The author first states the disputed doctrine, as laid down by *Manwoode*, in the case of *Clere* and *Brook*, namely, that "the brother or sister of the purchaser's grandmother, viz. the mother of the purchaser's father, shall be preferred to the brother or sister of the purchaser's great grandmother, viz. the mother of the purchaser's father's father; be-

"cause they are equally worthy in blood; for such heirs come from the blood of the female sex, from which the purchaser's father issued; and where they are equally worthy, the next of blood shall always be preferred as heir." The objections of *Blackstone* are then stated; after which the author proceeds to consider the first principles of inheritance.

The first claim to inheritance, he states, arises from **DIGNITY** of blood; but, as it frequently happens that the claimants are equal in point of dignity, the right of inheritance arises, secondly, from **PROXIMITY** of blood to the person last seized. The first is absolute, and operates on all occasions; the second admits of some modification, whereby it differs from the strict idea of proximity.

Having established these principles, the author proceeds with his remarks on the reasons assigned by

by Blackstone, for preferring the heirs of the great-grandmother on the father's side, in opposition to Manwoode, who prefers the heirs of the grandmother on the same side.

As to the first reason of Blackstone,—"because this point was not the principal question in the case of *Clerc and Brook*, but the law concerning it is delivered *obiter* only, and in the course of argument, by Manwoode, though afterwards said to be confirmed by the three other justices, in separate ex-
judicial conferences with the reporters,"—admitting that the present point was not the principal question in the case, the author remarks, however, that as it was laid down by a judge in court, and delivered in his judicial capacity, some respect is due to his sentiments: that when illustrations are applied by analogy, a facility of reasoning must run through the whole subject, and that the decision itself being just, the arguments which lead to it derive from that decision, must be just also: that though Blackstone may not allow that the law delivered *obiter*, was founded on the same substantial reasons, which led to the final judgment, still he could not contend, that because it was delivered *obiter*, it was therefore less reasonable; or because it was said to be confirmed by the three other justices, that it was not their opinion; or, if it was their opinion, that it was a bad one.

As to the second reason,—"because the chief justice, Sir James Dyer, in reporting the resolution of the Court, in what seems to be the same case,

"takes no notice of this doctrine,"—he remarks, that the report of Sir James Dyer is extremely short, and does not give the distinct opinion at large, of any of the bench, even to the point before them; he, therefore, cannot be expected to take notice of any collateral matter. If we wish to see the arguments of the judges, Plowden hath reported them. If we are not satisfied, whither can we refer? Plowden is positive; Dyer is neutral; and surely, we ought not to discredit the representations of the former, and argue from the silence of the latter. From Plowden it appears that the chief justice was present, when Manwoode delivered this, as law. What then can we infer from his silence, except his consent?

As to the third reason,—"because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied with this position of Manwoode," the author has given the passage, which Plowden subjoins to his report; which says that many were of opinion; that the brother of the great-grandmother should be preferred to the brother of the grandmother; but says likewise, that this position of Manwoode was confirmed by Justice Harper, Justice Monson, and Lord Chief Justice Dyer. Therefore, continues the author, when Bacon and Hale adopted this position, they had the unanimous opinion of the bench to support it; when the author of the Commentaries disallowed it, he was only justified by the scruples of many bystanders to reject it.

As to the fourth reason,—“because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks, in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood;” the author compares the position of Manwoods with the principles above stated, from whence he infers; First, that in point of *dignity* of blood, the claimants are equal; they representing female stocks of the paternal line; therefore upon that ground merely, the one could not be preferred to the other; but

Secondly, that in point of proximity, the grandmother is nearer to the person last seized, than the great grandmother; it follows then, continues the author, that this position, being supported by the principles of inheritance, cannot destroy that regular symmetry, which arises from a conformity to those very principles.

With respect to the latter part of the fourth reason, he professes himself at a loss to understand in what manner the position of Manwoods can “destroy the constant preference of the male stocks;” when, by the very terms of the question, they and their descendants are extinct.

As to the fifth reason,—“because it introduces all that uncertainty and contradiction pointed out by an ingenious author—(Law of Inheritances, 2d edit. p. 30, 38, 61, 62, 66).

and establishes a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brook, [viz. the preference of N^o 11. to N^o 14, (a)] and though that learned writer proposes to rescind the principal point then resolved, it is apprehended that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all,—the author shews that the charges of uncertainty and contradiction, though groundless, were not brought against Manwoode’s position in particular, but against “the descendants of the collateral ancestors of the higher classes;” comprehending among others, the class for which Blackstone contends; and that the deliberate opinion of the ingenious author of the Law of Inheritances, where he simply informs us what the law is (not what it ought to be), supports the position of Manwoode, and is directly contrary to that of Blackstone.

With respect to the charge of “incompatibility,” mentioned in the same reason, the author remarks, that to establish the charge, it should be proved that one was more worthy than the other.—This hath not been attempted. Therefore, continues he, if the reputation of the Commentator did not prevent us from making hasty conclusions, we should be well justified in treating this charge as a violent assumption.

As to the sixth reason,—“because the reason that is given for this doctrine in Plowden, Bacon, and Hale, (viz. that in any degree paramount the

(a) The numbers 11 and 14 in Blackstone’s Table of Descents, Com. 2v. 240.

"first, the law respecteth proximity, and not dignity of blood) "N^o 18. ought also to be preferred "to N^o 16. which is directly contrary to the eighth rule laid "down by Hale himself"—the author admits that Lord Bacon expresses himself in these direct terms; "in any degree paramount the first, the law respecteth proximity and not "dignity of blood;" but observes, that as it is totally repugnant to the spirit of those laws, from whence the doctrine of descent originates; so it has been contradicted by every writer on the subject, and is therefore inadmissible. As to any such doctrine in Pflowden or in Hale, the author professes he could find none; but on the other hand, contends that they have advanced doctrines supporting that of Manwoode, and directly contrary to what is suggested in the reason.

As to the seventh reason,— "because this position seems to "contradict the allowed doctrine "of Sir Edward Coke, who "lays it down (under different "names), that the blood of the "Kempes, alias Sandies, shall "not inherit, till the blood of the "Stiles, alias Fairfields, fail: "now the blood of the Stiles's "does certainly not fail, till both "N^o 9. and N^o 10. are extinct: "wherefore N^o 11. being the "blood of the Kempes, ought not "to inherit till then"—the author admits that the blood of John Stiles does not fail while N^o 10. exists, but observes that George Stiles the grandfather married Cecilia Kempe, and that, according to Sir Edward Coke, "the father hath two immediate "bloods in him, the blood of his

"father and the blood of his "mother, and both these bloods "are of the part of the father."

It is therefore evident, says he; that as the blood of John Stiles does not fail while N^o 10. exists, so neither does it fail while any of the representatives of the grandmother, or N^o 11. exist.—Such being the claim of N^o 11. the author proceeds to discuss the right by the rule of Blackstone himself, that, "in order to ascertain the collateral heir of John Stiles, it is in the first place necessary to recur to his ancestors "in the first degree; on default "of which, we must ascend one "step higher, to the ancestors in "the second degree; then to "those of the third and fourth, "and so upwards, *in infinitum*, "till some ancestors be found who "have other issue descending "from them, beside the deceased, "in a parallel or collateral line. "From these ancestors the heir "of John Stiles must derive his "descent." In obedience to this rule, continues he, let us recur to the first degree;—ancestors there are none living:—to the second; by the question, they are extinct:—in the third we find N^o 11, or the representatives of the paternal grandmother. If, for the sake of speculation, we pursue our enquiries, we may find collateral ancestors in the fourth degree, or N^o 10, but the inheritance is previously vested; it is cast on N^o 11. Again, in the Commentaries we find this direction: "In order to "keep the state of John Stiles as "nearly as possible in the line of "his purchasing ancestors, it must "descend to the nearest couple of "ancestors that have left de-

"scendants

ascendants behind them." Can it be added, the author, remain a doubt, which is the nearest couple, or whose issue shall succeed? As to the eighth reason,—"because in the case *Mars Ed.* 4. 1012. Fitz. Abr. 1. Descent, 2. Bro. Abr. 1. Descent, 38. (much relied on in that of *Clere and Brook*) it is laid down as a rule, that *Cestuy qui droit inheriter al pere doit inheriter al fis*; and to Sir Matthew Hale says, that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been had the father inherited: now it is settled, in the resolution in *Clere and Brook*, that No. 102. should have inherited to Geoffrey Stiles, the father, before No. 101. and therefore No. 102. ought also to be preferred in inheriting to John Stiles the son."—the author first states the authority from the *Year Book at large*, which says, that who are the representatives of the whole stock, of the paternal line, are excluded, the heir of the son on the part of the Ailes (for whom *Manwood* contends), ought to inherit. Having expressed his surprise, that an argument should be drawn from a case which he might justly cite in his own support, he proceeds to state the authority referred to in Sir Matthew Hale, who, in his opinion, meant to exemptify the doctrine of proximity by its several degrees; and to inform us, that though the father, grandfather, and great-grandfather cannot immediately inherit, still we must resort to them, as to the stocks from

whence we are to trace proximity and primogeniture. And to this rule, continues the author, hath he referred the matter at present in question, which he hath stated and decided in the following terms: "When the son is once seised, and dies without issue, his grandmother's brother (or No. 11.) is to him heir of the part of his father, and, being nearer than his great-grandmother's brother, is preferred in the descent."

Having thus shewn that no such doctrine as that contained in the eighth reason, can be gathered from the authorities there cited, the author goes on to shew, that if it be a point, it is nevertheless inconsistent with the laws of descent; because it contradicts the approved maxim, *semina facit stipitem*; for if we are to trace from the father, it will introduce universal confusion; will confound the distinction made, by Sir Edward Coke, that the father hath two bloods in him, by which means the father's moiety, though of the female line to him, is of the male line to the son; for if we are to trace from the father, his mother must be of the female line to the son; and, it has is still more injurious, in such case, the whole maternal line will be totally excluded, for there is no proximity of blood between the father and the line of the mother.

The author then contends, that the resolution in *Clere and Brook* is indirectly stated in the eighth reason. It was there settled, says he, that the heir of the paternal grandmother, of the person last seised, should succeed in preference

BUT for the better illustrating and clearing of the rules and methods of descents, and of the different directions of the civil law, the canon law, and the common law therein, I shall here subjoin the so-much-famed *Arbor Civilis* of the civilians and canonists; which being compared with the *Gradus Parentela* in the First Institutes, will fully illustrate what has been already said (1).

rence to the mother's brother: whereas in the Commentaries we are told who might, or should have succeeded to the father.

Upon the whole, the author asserts, that, of the foregoing reasons, the first, second, and third, are merely speculative; the fourth is drawn from an inapplicable medium, and a charge which is contradicted by the express words of Plowden; the fifth depends upon a distorted authority, and violent assumption; the sixth on a misquotation; the seventh involves a contradiction between the table and the text; and of the eighth it will not be intemperate to say, that it collects a point of doctrine from authorities by which that doctrine is opposed, and which point is applied to a case we are directed not to allow; and from which an inference is drawn, though we are enjoined not to admit of the premises.

Such are the remarks upon the reasons assigned by Blackstone for opposing the doctrine of Manwoode; in the course of which decency is not violated by the petulance of controversy, nor truth offended through zeal for a favourite system. Mr. CHRISTIAN, the editor of the last edi-

tion of Blackstone's Commentaries, concurs with the learned Commentator in preferring N^o 10. to N^o 11.—For his reasons, see *Blac. Com.* 2 v. 239. ed. 1794:—an edition which has certainly contributed to the “improvement of that valuable production;”—and will, I make no doubt, eventually add to its celebrity.

Here it may in general suffice to observe, that inheritable blood is wanting to such as are not related to the person last seised—to maternal relations, in paternal inheritances; and *vice versa*—to kindred of the half blood—to monsters—bastards—aliens, and their issue—to persons attainted of treason or felony, and to papists, in respect of themselves only, by the statute law, 11 & 12 W. III. c. 4. but see 18 Geo. III. c. 6. and 31 Geo. III. c. 31.—Persons so circumstanced, are excluded from taking by descent; and in consequence, the estate in the language of the law, “*escheats*” or falls to the lord of the fee. See *Blac. Com.* 1. 2. c. 15. *passim*.

(1) *Blac.* 1. 2. cap. 31. *Brit.* cap. 89. *Fleta*, 1. 5. cap. 7. *Mir.* cap. 1. sec. 3. *Co. Lit.* 18. b.

C H A P. XII.

Touching trial by jury.

HAVING in the former chapter somewhat largely treated of the course of descents, I shall now, with more brevity, consider that other title of our law which I before propounded—in order to evidence the excellency of the laws of England above those of other nations,—viz. the trial by a jury of twelve men; which, upon all accounts, as it is settled here in this kingdom, seems to be the best trial in the world. I shall therefore give a short account of the method and manner of that trial [A].

FIRST,

[A] The method of trial by *jury*, which is also denominated trial *per pais*, or *by the country*, is justly esteemed one of the chief excellencies of our Constitution, it being an institution most admirably calculated for the preservation of liberty, life, and property: indeed, what greater security can we have for these inestimable blessings, than the certainty that we cannot be divested of either, without the unanimous decision of twelve of our honest and impartial neighbours? Our sturdy ancestors insisting on it as the principal bulwark of their liberties, compelled the confirmation of it by *Magna Charta*; “Nullus
“liber homo capiatur, (speaks the Charter, chap. 39.) vel impris-
“sonetur, aut disseisnetur de libero tenemento suo, vel libertatibus,
“vel liberis consuetudinibus suis, aut utlagatur, aut exuletur, aut
“aliquo modo destruetur, nec super eum ibimus, nec super eum
“mitteremus, NISI PER LEGALE JUDICIUM PARIUM SUORUM, VEL
“PER LEGEM TERRÆ.”

The invention of this species of trial has been attributed to the superior genius of Alfred; there seems but little reason, however, to adopt the idea; the merit of Alfred consisting rather in fixing the number, and determining the qualities of jurors, than in the institution itself (a). The truth seems to be, that this tribunal was univer-

(a) Salliv. Lest. xxyi.

FIRST, the writ to return a jury issues to the sheriff of the county (*a*). And,

FIRST, HE is to be a person of worth and value, that so he may be RESPONSIBLE for any defaults, either of himself, or his officers; and is sworn, faithfully and honestly to execute his office. This officer is entrusted to elect and return the jury, which he is obliged to do in this manner: First, without the nomination of either party. Secondly, they are to be such persons, as for estate and quality are fit to serve upon that employment. Thirdly, they are to be of the neighbourhood of the fact to be inquired, or at least of the county or bailiwick (*b*). And, fourthly, anciently four, and now two of them at least, are to be of the hundred [B].

SECONDLY,

(*a*) For the antiquity and office of sheriff, see Co. Lit. 168. Blac. Com. 1 v. 116.—but particularly Id. 338 to 348. and Seld.

notes upon Fortesc. de Laud. cap. 14.

(*b*) Vicinus facta vicini præsumitur scire. 1 Inst. 125.

fully established among all the Northern nations, and so interwoven in their very Constitutions, that the earliest account of the one gives us also some traces of the other. In this nation, it has been used time out of mind, and is coeval with the first civil government thereof; and though its establishment was shaken for a time by the introduction of the Norman trial by battle, it was always so highly valued by the people, that no conquest, no change of government, could ever prevail to abolish it. See Fortesc. de Laud. Leg. Ang. cap. 25. Spelm. Gloss. verb. Jurata. Glanv. l. 2. c. 7. Co. Lit. 155. Co. in Pref. to the 3d and 8th Rep. Blac. Com. 3 v. c. 23. passim. Sulliv. Lect. p. 247, 251, 294, 356. Barr. on Stat. 17, 18, 19, 86, 457. Hickes's Thes. vol. II. p. 34, and seq. See also an essay on "The Constitution of England," written by J. L. de Lolme, cap. 9, 10, 11. This book is recommended to the public, by the author of the elegant letters under the signature of Junius, "as a performance, deep, solid, and ingenious." Pref. 31.

[B] By the policy of our ancient law, the jury was to come *de vicino*, from the neighbourhood of the place where the action was laid; and therefore, they were summoned from the very hundred in which the cause of action arose; and, in the opinion of Gilbert, the

SECONDLY, touching the number and qualifications of the jury.

fact itself was originally determined in the court of the hundred. Living in the neighbourhood, they were most unquestionably the very county, or *pais*, to which both parties had thought proper to appeal; and thus circumstanced, were supposed to have had a prior and a perfect knowledge, as well of the characters of the parties themselves, as of the witnesses, which each of them might think proper to adduce in support of that which he was called upon either to validate or defend: and from whence it was concluded, that they the better knew what credit to give to the facts in evidence before them. This convenience, however, was soon materially affected, from the difficulty of obtaining twelve freeholders in every hundred. To this difficulty may be added an inconvenience, which, in process of time, resulted from this ancient and long-continued mode of summoning the jury. It was found (Bar. Stat. 110.) that the jurors, from the very circumstance alone of being of the immediate neighbourhood, were too apt to be prejudiced. Long sensible of the difficulty of obtaining a perfect jury from the hundred, and daily perceiving the partiality of their decisions, our law has for a long time been gradually relinquishing the practice. In the reign of Edward the Third, the number of necessary hundredors was constantly six—these, in the time of Fortescue (a), were reduced to four. Indeed the statute 35 Hen. VIII. c. 16. restored the ancient number of six, but that was soon virtually repealed by statute 27 Eliz. c. 6. which required only two. However the number were reduced, yet some were continued; the law still conceiving it to be necessary that some at least of the *partes* of the hundred should determine the fact between the parties—Sir Edward Coke indeed (b) adduces such a variety of instances, in which the Courts permitted the necessary number to be evaded, that it is manifest they were heartily tired of it.—At length, by statute 4 & 5 Ann. c. 16. it was entirely abolished in all civil actions, except on penal statutes; and upon those also by 24 Geo. 2. c. 18. the jury being now only to come *de corpore comitatus*, from the body of the county at large, and not *de vicineto*, or from the particular neighbourhood. See Baron Gilbert's Hist. and Pract. of the Court of Common Pleas, cap. 6, 7, 8. *passim*; a book which will reward the most studious attention.—It must be confessed, however, that this posthumous work, of so excellent an author, has suffered much from the ignorance and inattention of those who have attempted to edit it. See also Mr. Hargrave's note on Co. Lit. 125. a. note 2. and H. H. P. C. 1 v. 2. 2.

(a) De Laud. l. c. 25.

(b) 1 Inst. 157.

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As to their number, though only twelve are sworn, yet twenty-four (c) are to be RETURNED, to supply the defects or want of appearance of those that are challenged off; or make default (d). Their qualifications are many, and are generally set down in the writ that summons them (e). They are to be *PROBI ET LEGALES HOMINES*. Of sufficient freeholds, according to several provisions of acts of parliament [C]. Not convict of any notorious crime that may render

- (c) At common law, even in civil cases, the sheriff might have returned more than twenty-four, if he pleased. He is restricted to twenty-four by the stat. West. 2. c. 38. The statute extends not to criminal prosecutions. Kelyng, 16. (d) Fortesc. de Laud. cap. 25. Sin Edward Coke thinks "that the law delighteth herself in the number twelve."—For his reason, which is somewhat quaint, see Co. Lit. 155. a. (e) The writ of *venire facias*. Seld. on Fortesc. de Laud. c. 25. Blac. Com. 3. v. 352.

[C] By the statute Westminster 2. 13 Ed. I. c. 38. none shall pass on juries, in assizes, within the county, but such as may dispend twenty shillings by the year at the least; which is encreased to forty shillings by the statute 21 Ed. I. statute 1 and 2. Henry V. statute 2. c. 3. This was doubled by the statute 27 Eliz. c. 6. which requires in every such case the jurors to have estate of freehold to the yearly value of four pounds at the least. But the value of money at that time decreasing very considerably, this qualification was raised by the statute 16 and 17 Car. II. c. 3. to twenty pounds *per annum*, which being only a temporary act, for three years, was suffered to expire without renewal, to the great debasement of juries. However, by the statute 4 and 5 W. and M. c. 24. it was again raised to ten pounds *per annum* in England and six pounds in Wales, of freehold lands or copyhold; which is the first time that copyholders (as such) were admitted to serve upon juries in any of the king's courts; though they had before been admitted to serve in some of the sheriff's courts, by statutes 1 Rich. III. c. 4. and 9 Henry VII. c. 13. And, lastly, by statute 3 Geo. II. c. 25. any leaseholder for the term of five hundred years absolute, or for any term determinable upon life or lives, of the clear yearly value of twenty pounds *per annum*, over and above the rent reserved, is qualified to serve upon juries. When the jury is *de medietate lingue*, that is, one moiety of the English tongue or nation, and the other of any foreign one, no want of lands shall be cause of challenge

render them unfit for that employment. They are not to be of the kindred, or alliance, of any of the parties. And not to be such as are prepossessed or prejudiced before they hear their evidence.

THIRDLY, the time of their return (*f*).

INDEED, IN ASSIZES, the jury is to be ready at the bar, the first day of the return of the writ; but in other cases, the panel (*g*) is first returned upon the *venire facias*, or OUGHT TO BE SO, and the proofs, or witnesses, are to be brought, or summoned by DISTINGAS, or HABEAS CORPORA, for their appearance AT THE TRIAL; whereby the parties may have notice of the jurors, and of their sufficiency and indifferency, that so they may make their challenges upon the appearance of the jurors, if there be just cause.

FOURTHLY, the place of their appearance,

IF it be in cases of such WEIGHT AND CONSEQUENCE, as by the judgment OF THE COURT is fit to be tried AT THE BAR, then their appearance is directed to be THERE. But in ordinary cases, the place of appearance is in the country at the assizes, or *nisi prius*, in the county where the issue to be tried arises (*h*). And certainly this is an excellent constitution.

(*f*) The sheriffs should, by summons, notify to them their return, and likewise shew them the panel.

(*g*) The panel is a narrow piece of parchment, on which the names of the jurors are written, and which is also annexed to the

venire. A jury is said to be impanelled, when the sheriff hath entered their names in the panel.

(*h*) This is well explained by Mr. Justice Blackstone, in the third volume of his Commentaries, page 352. seq.

lance to the alien; for, as he is incapable to hold any, this would totally defeat the privilege,

The

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The great charge of suits is the attendance of the parties, the jury-men and witnesses: and therefore though the preparation of the causes, in point of pleading to issue, and the judgment, is for the most part in the courts at Westminster, whereby there is kept a great order and uniformity of proceedings in the whole kingdom, to prevent multiplicity of laws and forms; yet those are but of SMALL charge, or trouble, or attendance; one attorney being able to dispatch forty men's business with the same ease, and no greater attendance than one man would dispatch his own business. The great charge and attendance is AT THE TRIAL, which is therefore BROUGHT HOME to the parties in the countries, and for the most part near where they live.

FIFTHLY, the persons BEFORE WHOM they are to appear.

If the trial be AT THE BAR, it is to be before that court where the trial is. If in the country, then before the justices of assizes, or *nisi prius*; who are persons well acquainted with the common law, and, for the most part, are TWO of those twelve ordinary justices who are appointed for the common dispensation of justice in the three great courts at Westminster. And this certainly was a most wise constitution: for

FIRST, it prevents factions and parties in the carriage of business, which would soon appear in every cause of moment, were the trial only before men residing in the counties,—as justices of the peace, or the like;—or before men of little or no place, countenance, or pre-eminence above others. And the more to prevent partiality in this kind, those judges are by law prohibited to hold their sessions in counties where they were born or dwell (*i*).

SECONDLY,

(*i*) As it was reasonably apprehended, that the integrity of the judge might be biased, if his interest was concerned; or his affections

SECONDLY, as it prevents factions and part-takings, so it keeps both the rule and the administration of the laws of the kingdom UNIFORM. For those men are employed as justices, who, as they have had a common education in the study of the law, so they daily, in Term-time, converse and consult with one another; acquaint one another with their judgments; sit near one another in Westminster-hall, whereby their judgments and decisions are necessarily communicated to one another, either immediately, or by relations of others. By this means their judgments, and their administrations of common justice, carry a CONSONANCY, CONGRUITY, AND UNIFORMITY, ONE TO ANOTHER: whereby both the laws and the administrations thereof are preserved from that confusion and disparity that would unavoidably ensue, if the administration was by several INCOMMUNICATING hands, or by PROVINCIAL establishments. And besides all this, all those judges are solemnly sworn to observe and judge ACCORDING TO THE LAWS of the kingdom, and according to the best of their knowledge and understanding.

SIXTHLY, when the jurors appear, and are called, each party has liberty to take his challenge to the ARRAY itself, if unduly or partially made by the sheriff; or if the sheriff be of kin to either party:—or to the POLLS; either for insufficiency of freehold, or kindred or alliance to the other party;—or such other challenges, either principal, or to the favour, as render the juror unfit and INCOMPETENT to try the cause.—

afflictions were engaged, it was wisely provided by the statutes 4 Edw. III. c. 2. 8 Rich. II. c. 2. and 33 Hen. VIII. cap. 24. that no judge of assize should hold pleas in any county wherein he was born or inhabits. In the Roman empire the strictest regulations were established, to exclude any

person, without the special dispensation of the emperor, from the government of the province where he was born. Cod. Justinian. l. i. tit. xli. Dion. l. lxxi. The same regulation is observed in China, with equal strictness and with equal effect.

And

And the challenge being confessed, or found true, by some of THE REST of the jury, that particular incompetent person is withdrawn (A).

SEVENTHLY, then twelve, and NO LESS, of such as are INDIFFERENT and are returned upon the principal panel, or the tales, are sworn to try the same ACCORDING TO THE EVIDENCE.

EIGHTHLY, being thus sworn, the evidence on either part, is given in, upon the OATH of witnesses (1), or other evidence by law allowed;—as records and ancient deeds [D];

(A) Challenges are of two sorts; (1) Some trials by outlaw are either to the array, which is determined by witnesses, without once an exception to the whole jury; as of the life and death of panel, in which the jury are arrayed the husband in dower, and in C. rayed, or set in order by the sheriff in writa. Bract. l. 4. tit. 6. cap. 7. ruff, in his return; or, to the polls, 2 Ed. 2. tit. Trial, 460. 3 Ed. 2. in capita, and which are exceptions. 1 Ed. 2. tit. 95. 3 Ed. 2. tit. Judgments to particular jurors: these are 231. Dy. 185. a. 301. a. Sir Edward Coke (1 Inst. 156). But such cases relate only to issues reduced to four heads; *propter bo-* which have no *venar* from whence *horis respectum*: *propter defectum*; no a jury may be summoned: Seld. *propter affectum*; and *propter delic-* mon Fortesc. de Laud. cap. 21. See *tam*. See Gilb. Hist. C. P. cap. 8. Blac. Com. 3 v. cap. 21. and the Seld. Baron. II. 11. Finch. L. case of Ilderton and Ilderton, re 401. But see Blac. Com. l. 3. reported by H. Blac. 2 v. 245. c. 23.

[D] From the time of the Norman conquest, writings which we now call DEEDS, were generally called CHARTERS (2). The witnesses to charters were anciently, for the most part, men well known and of good condition, and very often persons of the neighbourhood. If the charters were executed in the county, they were frequently attested by gentlemen and clergy of the county; when they were executed in cities or in towns, they were often attested by the provost, mayors, bayliffs, or civil officers. "*Ad probationem investitura non alii testi,*" "*quam pares admittuntur, quia coram eis solemniter fieri debet investi-*

(2) Madox's Form. Diff. III. In- | Hist. Excheq. VIII. XVI.
gulph. p. 901. Pref. Epist. to Madox's

but later deeds and copies of records must be attested by the oaths of witnesses;—and other evidence in the open court, and in

"*tura* (b)." Men of such distinction were probably known either by their hands, or by the signets which they affixed to their testimony; an attestation *in perpetuam rei memoriam* (c). If the charters came in question, and the parties were alive to prove them, they were admitted in proof; but if they were of ancient date and free from suspicion, upon producing them, they were allowed. It is generally thought, that Edward the Confessor first introduced the mode of affixing to charters a seal of wax. What Sir Edward Coke (d) says should be a little considered. It is true, the word (*sigillum*) occurs in many Latin charters before the Conquest; but if it be likewise true, that *sigillum* was in those times used in the same sense with *signum*, as Sir Henry Spelman (e) and others have observed, then perhaps no great stress can be laid upon the words of subsignation to Edwy's charter, mentioned by Sir Edward Coke (f). *Sigillum* did not always signify a seal of wax. There is a charter of K. Edwy (A. D. 956) granting to the monastery of Bath 30 *Manses*, &c. at Dyddanham, subsigned "Ego *Ædwig* rex Anglorum indeclinabiliter concessi. +. Ego *Eadgar* ejusdem regis frater celeriter concessi. +. Ego *Odo* Archiepiscopus cum signo sanctæ crucis impressi. +. Ego *Ælffinus* Præsul sigillum ægyptiæ crucis impressi. + &c." As to *Offa*'s charter, if Coke had informed us where it might be seen, it would, perhaps, appear to be either a great rarity, or a great counterfeit (g). In truth it may be taken for granted, that from the time of the Norman Conquest, seals were generally used in this kingdom. Then charters were ratified, or authenticated by affixing to them a seal of wax: and which custom has been used in England ever since (h). In Scotland, the seals of the inferior nobility, and better sort of freeholders, were in common use as early as the time of David the First, A. D. 1124. and were then esteemed as undeniable evidence, in courts of judicature: so that if a man's seal was proved, he was obliged to warrant the instrument to which it was affixed, and to submit to whatever inconveniencies his own negligence might bring upon him (i). The ancient seals were in wax of different colours; red, green, or yellow; they were commonly either round or oval, though of different sizes. Those of ecclesiastical persons were usually oblong, or oval, though not always so. The seal was usually affixed to a label of parchment, fastened to the fold, at the

(b) Cujac. Com. in lib. i. de feud. tit. 1. p. 18. (edit. Lugd. 1566).
Madox's Form. Diff. XXVI.

(c) Spelm. Reliq. 256.

(d) 1 Inst. 7. a.

(e) Ad v. v. Sigillum et Signum.

(f) Ubi supra.

(g) Madox Form. Diff. xxvii.

(h) Ibid.

(i) Nicholson, sc. H. L. 247, 2; Reg. Majest. L. c. 3.

in the presence of the parties, their attornies, counsel, and all by-standers, and before the judge and jury: where each party has liberty of EXCEPTING, either to the competency of the evidence, or the competency or credit of the witnesses; which exceptions are PUBLICLY stated, and by the judges openly or publicly allowed or disallowed;—wherein if the judge be PARTIAL, his partiality and injustice will be evident to all by-standers. And if in his direction or decision he mistake the law, either through PARTIALITY, IGNORANCE, OR INADVERTENCY, either party may require him to seal A BILL OF EXCEPTION (*m*), thereby to deduce the error

(*m*) This the judge is obliged to seal by stat. Westm. 2. 13 Ed. I. c. 31.; should he refuse to seal it, the party may have a compulsory writ against him. Reg. Br. 182. s. 10. 2 Inf. 487. This writ enjoins him to seal the bill of exceptions, if the fact alledged be truly stated; for, in the bill, the counsel must state the point wherein the judge is supposed to have erred. If to this writ the judge returns that the fact is untruly stated, when, in truth, the case is otherwise, then an action may be maintained against him for such his false return. This bill of exceptions is in the nature of an appeal; examinable, NOT in the court out of which the record issues for trial, but in the next im-

mediate superior court, upon a writ of error, after judgment given in the court below. But this mode has been of late years much discontinued, as it is now common for the courts to grant NEW TRIALS for the misdirection of the judge at *nisi prius*. See the case of Money v. Leach, in 3 Bur. 1692. where the tenor of the writ, for the judge to acknowledge his seal to a bill of exceptions, and the whole form and ceremony of the transaction, is minutely reported.—For an assignment of errors, setting forth the bill of exceptions, see Id. 1746. Were bills of exception more frequent, the administration of justice might possibly become more stable.

bottom of the charter; or else to a silken string (*l*), fastened in like manner to the fold; or else to a piece of parchment, cut from the bottom of the charter, and made pendulous. The seal was apparently of great force, inasmuch that the charter, in a manner, derived its whole strength and validity from it (*l*). In ancient times the credit

(*l*) Hickee, 160.

(*l*) Madox Form. Dist. xviii. Seld. iii. 1466, 7.

ror of the judge, if any were, to a due ratification or reversal by writ of error [E].

NINTHLY,

of legal instruments was justified by the authentic seals of the parties, and not by the subscription of notaries (m). *Chirographum* was a deed consisting generally of two parts; one for each party, and both of the same tenor: for which purpose the deed was written twice, upon the same piece of parchment, and between the body of each part, the word *Chirographum* was written in capitals; the parchment was then dissected through the middle of those letters; and that either rectilinearly or indentwise (n). Charters were formerly executed with so much notoriety, that there was no necessity for the witnesses to subscribe their names; that being done by some clerk, in the presence of them all. Madox Form. Diff. xxxi. See more upon this article in Spelman's Remains of Ancient Deeds and Charters, and in Dr. Hickes's Epistolary Dissertation, passim. Camp. Brit. 345.

[E] If the student be desirous of obtaining a thorough knowledge of the theory of evidence, he may, after perusing the twenty-third chapter of the third book of Blackstone's Commentaries, consult *Duncombe's Trials per Pais*, in the chapter on Evidence; the *Law of Evidence* by Chief Baron Gilbert; the *late Evidence* in the several treatises on the pleas of the crown; and in the several abridgments of law and equity; and the heads of Evidence in the *Law of Nisi Prius*. The writings of the Civilian on Evidence are numerous; and the curious reader may see an account of them in Baderus's edition of the *Bibliotheca Juris* by Struvius. Amongst the most admired of their professed writers on the subject are; *Magnolus de Presumptionibus*, *Mascardus de Probationibus*, *Everhardus de Testibus et Fide Instrumentorum*; and *Pastorius de Testibus*. Struvius's *Bibliotheca Juris* will be found very useful to the diligent student, by introducing him to a knowledge of the principal books on the law of nature and nations, the civil and canon law, and the laws of most of the countries in Europe, and of the characters of the several writers. It is to be wished, that we had a *Bibliotheca Juris Anglicani*, written on the same critical and enlarged plan. Such a work has been attempted by Mr. Gatzert, a German writer; who published at Göttingen a book entitled, *Compendio Juris exotici Historico-literaria de Jure communi Anglice*. But though Mr. Gatzert, when the disadvantage of his being a foreigner is considered, has really done wonders; yet it is not to be conceived, that such a work can ever be executed with the requisite judgment, accuracy, and nicety, until the task is undertaken by one of our

(m) Madox, ubi sup. p. 131.

(n) lb. xxviii. ix.

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NINTHLY, the excellency of this OPEN course of evidence to the jury, in presence of the judge, jury, parties and counsel, and even of the adverse witnesses, appears in these particulars.

1st, THAT it is openly, and not in private before a commissioner or two, and a couple of clerks; where oftentimes witnesses will deliver that, which they will be ashamed to testify publicly.

2dly, THAT it is ONE TENUS, personally, and not in writing; wherein oftentimes, yea too often, a crafty clerk, commissioner, or examiner, will make a witness speak what he truly never meant, by dressing of it up in his own terms, phrases, and expressions. Whereas on the other hand, many times the very MANNER of delivering testimony, will give a probable indication, whether the witness speaks truly or falsely. And by this means also he has an opportunity to correct, amend, or explain his testimony, upon further questioning with him; which he can never have, after a deposition is set down in writing (n).

3dly, THAT by this course of personal and open examination, there is opportunity for all persons concerned, viz. the judge, or any of the jury, or parties (o), or their

own country, who hath been regularly trained in the study of the English law, and is familiarly acquainted with all the writers on our laws; constitution and history. Harg. note 1. on Co. Lit. 1. 2.

(n) Blac. Com. 3 v. 373.

(o) Formerly those who knew that natural and indisputable right. Want of judgment, or of temper (independent of other reasons) in the parties interested, was a sufficient ground for the discontinuance.

now, if they please, exercise that natural and indisputable right. Want of judgment, or of temper (independent of other reasons) in the parties interested, was a sufficient ground for the discontinuance.

council or attorneys, to propound occasional questions; which beats and boulds out the truth much better, than when the witness only delivers a formal series of his knowledge, without being interrogated. And on the other side, preparatory, limited, and formal interrogatories in writing, preclude this way of occasional interrogations; and the best method of searching and fishing out the truth, is choked and suppressed.

4thly. Also by this personal appearance and testimony of witnesses, there is opportunity of CONFRONTING the adverse witnesses; of observing the contradiction of witnesses sometimes of the same side; and by this means great opportunities are gained, for the true and clear discovery of the truth.

5thly. AND further, the very quality, carriage, age, condition, education, and place of commorance of witnesses, is, by this means, plainly and evidently set forth to the court and the jury; whereby the judge and jurors may have full information of them; and the jurors, as they see cause, may give the more or less credit to their testimony.— For the jurors are not only judges of THE FACT; but many times of the truth of evidence. And if there be just cause to disbelieve what a witness swears, they are NOT bound to give their verdict according to the evidence, or testimony of THAT witness. And they may sometimes give credit to one witness, though opposed by more than one. And indeed, it is one of the excellencies of this trial, above the trial by witnesses, that although the jury ought to give a great regard to witnesses and their testimony, yet THEY ARE NOT ALWAYS BOUND BY IT; but may either upon reasonable circumstances, inducing a blemish upon their credibility,

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bility, though otherwise in themselves in strictness of law they are to be heard, pronounce a verdict **CONTRARY** to such testimonies, the truth whereof they have just cause to suspect, and may, and do **OFTEN**, pronounce their verdict upon one single testimony; which thing the civil law admits not of.

TENTHLY, another excellency of this trial is this; that the judge is always present, at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them, and **OBSERVING WHERE THE QUESTION AND KNOT OF THE BUSINESS LIES**; and by shewing them his opinion even in matter of fact; which is a great advantage and light to lay-men. And thus, as the jury assists the judge in determining the matter of **FACT**, so the judge assists the jury in determining points of **LAW**, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges.

ELEVENTHLY, when the evidence is fully given, the jurors **WITHDRAW** to a private place, and are kept from all speech with either of the parties, till their verdict is delivered up (p); and from receiving any evidence, other than in **OPEN COURT**,

(p) The jury should attend to the cause, through the whole evidence, and when they withdraw from the bar, should so conduct themselves, in point of judgment, that when they return into court, and are demanded, "whether they are agreed," to make answer by their foreman, the common conclusion of them all. This the law calls their **VERDICT**. "**Duodecim viri** (nam) "**dam-**

COURT, where it may be searched into, discussed and examined. In this recess of the jury, they are to consider their evidence; and if any writings under seal were given in evidence, they are to have them with them;—they are to weigh the credibility of witnesses, and the force and efficacy of their testimonies; wherein, as I before said, they are not precisely bound to the rules of the civil law, viz.—“to have two witnesses to prove every fact (9);” unless it be in cases

damnant vel absolunt, sed non judicant; vel, ut nos dicimus, penes eos est facti probatio, vel improbatio; vel, in causa omni, quoad factum, decernunt, &c. eorum iudicio; “quod veredictum dicimus, iudex vel iudices sententiam suam proferunt, & de jure pronunciant.” *Hickes, d. c. 40.*

Sternhook expresses himself in the following manner, on the engagement of an English jury:—“ad absolvendum verò vel condemnandum, in Angliâ, necessitate compelluntur, atque eoque famelici et quasi captivi includuntur, nemine intromisso, donec absolverint seu condemnaverint.” *De jure Sueonum et Gothorum vetusto, Holmiz, 1672, cap. iv. p. 59.* Of late times the jury do not withdraw, unless they have any doubt among themselves.

(9) By the civil law, where proof by witnesses may be received, it is necessary that there should be two of them at least.—*Unius responsio testis, omnino non audiat. Cod. 4. 30. 9.*

One single witness, of what quality soever he may be, makes no proof. *Dom. Civ. Law, 1 v. 450.* But see *Tholoff. Syntagm. Juris, lib. 48. cap. 13. sect. 9.* *Corvinaus Enchirid. tit. de Testibus. Ulpianus, lib. 31. ad edict. Digest, lib. 22. tit. 5. Fortesc. de Laud. cap. 20; 32.*—*Waterhouse on Fortesc. 250. Plowd. 12.* and the case of *Shatter v. Friend*, in 1 *Show. 158.* This the Civilians seem to have received from the Jews, *Deut. xix. 15. Matth. xviii. 16.*

To extricate itself out of this absurdity, the modern practice of the civil law courts has plunged itself into another. For as they do not allow a less number than two witnesses to be *plena probatio*, they call the testimony of one, though ever so clear and positive, *semi-plena probatio* only, on which no sentence can be founded. To make up therefore the necessary complement of witnesses, when they have one only to any single fact, they admit the party himself (plaintiff or defendant) to be examined in his

cases of treason (r) ;—nor to reject one witness because he is single ; nor always to believe two witnesses, if the probability of the fact does, upon other circumstances, reasonably encounter them (s) : for the trial is NOT here simply BY WITNESSES, but by jury. Nay, it may so fall out, that the jury upon their OWN knowledge, may know a thing to be FALSE, that a witness swore to be true ; or may know a witness to be incompetent, or incredible, though nothing be objected against him ; and may give their verdict accordingly (t).

TWELFTHLY, when the whole twelve men are AGREED, then, and not till then, is their verdict to be received. And therefore the majority of assentors does NOT conclude the minority, as is done in some countries, where trials by jury are admitted. But if any one of the twelve DISSENT, it is NO verdict, nor ought to be received.

his own behalf, and administer to him what is called the *supple-
tory* oath ; and if his evidence happens to be in his own favour, this immediately converts the half proof into a whole one. By this ingenious device, they satisfy at once the forms of the Roman law, and acknowledge the superior reasonableness of the law of England ; a law which permits one witness to be sufficient, where no more are to be had ; and to avoid all temptations of perjury, lays it down as an invariable rule, that *nemo testis esse debet in propria causa*.

(r) Sir John Kelyng, in his Reports of Pleas of the Crown, fo. 49. says, " it seems to me " very plain, by the express words

" of stat. 1 Ed. 6. c. 12. that at " the common law, one witness " was sufficient in high treason." But see 1 Ed. VI. c. 12. and 7 & 8 W. III. c. 3. s. 2. 4.

(s) Pref. to Coke's third and eighth Report. Camd. Brit. clxii. clxix. Fort. in Pref. 10.

(t) See Bushe's case, Vaugh. 147.—It has been said, not from any great authority (5 New Abr. 292.) that there is no case in support of the above doctrine ; and that the contrary may be inferred from the several cases which are stated in the Abridgment alluded to. The cases, however, do not in the least affect the principle which Sir Matthew has laid down.

It is true, that in ancient times, as Henry II. and Henry III's time, yea, and by Fleta in the beginning of Edward I's time, if the jurors dissented, sometimes there was added a number equal to the greater party, and they were then to give up their verdict, by twelve of the old jurors and the jurors so added. But this method has been long time antiquated, notwithstanding the practice in Bracton's time, lib. 4. cap. 9. and Fleta lib. 4. cap. 9.—For at this day the entire number first impanelled and sworn are to give up an UNANIMOUS VERDICT, otherwise it is none [F]. And indeed this gives a great

[F] The unanimity of the twelve jurors in their verdict, must be admitted to be a singular institution. Perhaps the reason for requiring this, at least in criminal prosecutions, arose from compassion to the prisoner; against whom if the offence was not proved, beyond all possibility of doubt in the most scrupulous juror, it was thought an error on the side of mercy, that a single *veto* should acquit him. Another reason for this unanimity might possibly have arisen from attainds being frequently brought in ancient times against juries, to which punishment every juror was liable; it was therefore reasonable that every case should have a power of dissenting, and not be concluded by the opinion of others. There is a passage, in Clarke's preface to the Laws of Hoel Dhu, which, at the same time that it shews that this mode of trial was in use among the Welsh, accounts, in some measure, for the unanimity of the petit jury, which is not required from the grand jury. There are perhaps many Englishmen, and even lawyers, who do not know, that in Scotland the unanimity of a jury is not required, except in revenue causes before the court of Exchequer; and that the chancellor, or foreman, gives the verdict upon a majority of a single juror; they therefore consist of an odd number, viz. fifteen; and are chosen out of five and forty returned by the sheriff; the pannel, or criminal, having a right to challenge, as by the English law. We find that the jury, consisting of an odd number, is a very ancient regulation in Scotland. "Such as be accused of any crime that deserves death, let them pass by" the sentence of seven honest men, or else nine, eleven, or fifteen (a)."

(a) Law of Kenneth, mentioned by Boethius (Hollingshead's translation),

a great weight, value and credit to such a verdict, wherein twelve men must unanimously agree in a matter of FACT,

L 4

and

Fabian, in his Chronicle, gives a very particular account of the mayor and aldermen of London (*b*) claiming privileges in the reign of Henry the Third, viz. that for a trespass against the king, a citizen should be tried by twelve of his citizens; for murder, by thirty citizens; and for trespass against a stranger, by the oath of six citizens, and himself.

Sir Matthew Hale, in his *Historia Placitorum Coronæ* (*c*), treating of the demeanor of the jury, and how their verdict is to be given, remarks, that—"if there be eleven agreed, and one dissenting, who says he will rather die in prison, yet the verdict shall not be taken by eleven; nor the refuser fined or imprisoned; and therefore where such a verdict was taken by eleven, and the twelfth fined and imprisoned, it was upon great advice ruled that the verdict was void; and the twelfth man was delivered, and a new venire awarded. 41 Affiz. 11. For men are not to BE FORCED to give their verdict against their judgment." He cites *P. 20 E. 1. Rot. 43. Noſs. coram rege.*

Mr. Emlyn, who published the above work from the original manuscript of Sir Matthew Hale, and that at the instance of the house of commons (*d*), has paid particular attention to the passage which I have just cited.—"Is it not," says Mr. Emlyn, "A FORCE, when any of the jurors are obliged to comply under the peril of being starved to death; for how can it be expected that twelve considering men should, in all cases, happen to be of the same sentiments?—Therefore anciently it was not necessary (at least not in civil causes) that all the twelve should agree; but in case of a difference among the jury, the method was to separate one part from the other, and then to examine each of them as to the reasons of their differing in opinion; and if, after such examination, both sides persisted in their former opinions, the court caused both verdicts to be fully and distinctly recorded, and then judgment was given *ex dicto majoris partis juratorum*. Thus, in a great assise upon

(*b*) These privileges claimed by the citizens of London are alluded to in a grant of king John's to the city of Lincoln, in the first year of his reign: "Concessimus etiam quod de placitis coronam tangentibus, se possint dirationare (i. e. clear

"themselves) secundum consuetudinem civium civitatis Londoniæ." Rot. chap. 1mo Johannis regis, N. 35. Petyt. MS. vol. 1. p. 10.

(*c*) Vol. 2. 297. ed. oct.

(*d*) Journ. 29 Novemb. 1680.

"a writ

and none dissent. Though it must be agreed, that an ignorant parcel of men are sometimes governed by a few, that are
more

a writ of right, between the abbot of Kirkstede and Edmund de Eyncourt, eleven of the jury found for the abbot, and one for Edmund de Eyncourt. In this case, the verdict of the eleven was first recorded, *Robertus de Harblinge et omnes alii præter Radulphum filium Simonis dicunt super sacramentum suum, &c.* and then follows the dictum of the twelfth. *Et prædictus Radulphus filius Simonis dicit super sacramentum suum, &c.* Then follows the judgment. *Sed quia prædicti undecim concorditer et præcise dicunt, quod prædictus Abbas et ecclesia sua prædicta majus jus habeant tenendi, &c. ideo consideratum est, quod prædictus Abbas et successores sui teneant prædicta tenementa de cætero in perpetuum, &c.* Placita coram justic' itinerant' in com' Lincoln anno 56 H. 3. Rot. 29. in dorso.

In an assize of novel disseisin, between William Tristram, plaintiff, and John Simenel and others, defendants; where the whole jury consisted of only eleven; ten found for Tristram, and one for Simenel; and both verdicts are recorded in this manner. *Decem jurati dicunt, quod, &c. et undecimus juratorum, scilicet Johannes Kinetb, dicit, &c. Et quia dicto majoris partis juratorum standum est, consideratum est, quod prædictus Willielmus recuperet seisinam suam de prædictis tenementis versus prædictos Johannem et alios per visum recognitorum, et dampna quæ taxantur per jur. ad duas marcas, et Johannes et alii in misericordia.* Pas. 14 E. 3. Rot. 10. coram rege.

The like practice is supposed, in the case above quoted by Sir Matthew Hale; Pas. 20 E. 1. Rot. 43. coram rege; which was thus: Martin Fitz-Oshert recovered seisin of certain lands in West-Somerton, against the prior of Buttelye, before John de Lovetot and William de Pageham, judges of assize, in Norfolk, anno 16 E. 1. The prior afterwards complained greatly, that injustice had been done him by Lovetot, at the said assize, and thereupon the bishop of Winchester and others were ordered to hear the matter and to do justice to the prior. Upon this Lovetot and Pageham were called before the bishop, &c. and the prior objected to Lovetot, "*quod fieri fecit falsam irrotationem in rotulis suis, et contrariam veredicto juratorum assise prædictæ, &c. et hoc paratus est verificare per prædictos juratores, qui omnes sunt superstites, &c.*" To which Lovetot and Pageham replied, by justifying themselves, and insisting "*quod bene et rite processerunt ad captionem illius assise, unde vocant recordum rotulorum suorum, &c.*" In which the judgment pronounced by Lovetot was entered in the following manner. "*Et*

" quia

more knowing, or of greater interest or reputation than the rest.

THIRTEENTHLY,

“ quia per prædictam assisam convictum [comperit] fuit, quod Edricus,
 “ de quo prædictus Martinus exiit, fuit liber homo et liberæ con-
 “ ditionis; et quamvis ipse Edricus, et exitus de ipso proveniens tenu-
 “ issent de prædicto priore et de prædecessoribus suis, tenementa sua
 “ in villenagio, et per villana servitia, hoc eis non præjudicat, quo
 “ minus corpora sua sint libera; eo quod nulla præscriptio temporis
 “ potest liberum sanguinem in servitutem reducere, ideo consideratum
 “ est, quod prædictus Martinus recuperet inde seisinam suam, &c. Et
 “ Johannes de Pykering unus recognitorum præfate assise, pro eo
 “ quod in veredicto præfate assise, narrando illud veredictum contra-
 “ rius fuit omnibus aliis recognitoribus, narrando aliud quam inter illos
 “ fuit provisum, sicut per examinationem eorum convictum [comper-
 “ tum] fuit, et mancipatus est per, &c. ideo ipse et mancipatores sui
 “ in misericordia. Et præceptum est vic, quod capiat prædictum J. de
 “ Pykering, et salvo, &c. ita quod habeat corpus ejus apud Kente-
 “ ford, &c. ad faciendum redemptionem suam pro transfectione præ-
 “ dicta.” The bishop of Wynton and his fellows then proceeded to
 examine Loyetot and Pageham touching the said judgment. “ Et
 “ quia in consideratione super veredicto primæ assise comperit est,
 “ quod J. de Pykering unus recognitorum prædictæ assise, narrando
 “ illud veredictum, contrarius fuit omnibus aliis recognitoribus, narra-
 “ do aliud quam inter eos fuit provisum; et nichil de illo contrario in
 “ recordo prædicto specificatur sive declaratur; immo quod veredictum
 “ captum fuit et receptum, ac si omnes de uno et de eodem assensu
 “ fuissent in veredicto prædicto; nec etiam veredictum ipsorum unde-
 “ cim declaratur sive specificatur, &c. nec duodecim ab undecim fuit
 “ separatus, nec examinatus per se; nec undecim a duodecimo fuerunt
 “ separati, nec per se examinati, &c. PROUT MORIS EST IN TALI
 “ CASU; et sic ex contrario veredicto subsequutum fuit iudicium non legi
 “ sive consuetudini regni consonum, videtur manifestè, quod recordum
 “ illud non est plenum, seu perfectum, in hoc casu, &c. Concordatum
 “ est quod assisa prædicta re-examinetur, &c.” Upon this the sheriff was
 “ ordered, quod venire faciat hic, &c. recognitores assise prædictæ, et
 “ quod faciat Martinum apparere the same day, ad audiendum, &c.
 “ Postea ad prædictum diem venerunt recognitores assise prædictæ. Et
 “ quia prædicti Johannes et Willielmus aliud recordati fuerunt, quam
 “ comperit fuit per recordum rotulorum ipsius Johannis; et etiam quia
 “ juratores

THIRTEENTHLY, but if there be matter of law that carries in it any difficulty, the jury may, to deliver themselves from

Y. IN THE STAIN

"juratores prædicti minus sufficienter fuerunt examinati super articulis
 "prædictis, sicut patet in recordo prædicto, iterato fuerunt juratores
 "jurati et examinati; qui dicunt super sacramentum suum, quod præ-
 "dictus Martinus fuit villanus ipsius prioris die quo ejectus fuit de præ-
 "dictis tenementis, &c. Et quia compertum est, etc. et quod prior ad
 "prædictam assisam coram præfatis J. et W. respondebat per ballivum
 "suum, qui quidem ballivus non potuit deducere in iudicium ius sangui-
 "nis nativi domini sui, absque præsentia domini sui, &c. ac etiam in
 "supradicto recordo, quod nulla præscriptio longi temporis potest liberum
 "sanguinem in servitutem reducere, quod omnino falsum est, &c.
 "videtur, quod iudicium J. de Lovetot erroneum est: Ideo considera-
 "tum est, quod prædictus prior rebabeat prædicta tenementa, ita quod
 "omnia sint in eodem statu, in quo fuerant ante captionem prædictæ
 "assisæ." Afterwards by writ of error, the record coram episcop.
 Wynton et sociis suis auditoribus querelarum was brought coram rege;
 and Martin Fitz Osbert assigned for error, that he had recovered
 seisin against the said prior "in grosso veredicto super diffinitione secu-
 "dum legem communem; et auditores sine brevi regis inde eis directio,
 "et sine aliquâ præmunitione ipso Martino rite factâ, contra legem
 "communem, ipsum a prædicto tenemento adjudicaverunt, et contra
 "tenorem Magnæ Chartæ domini regis: Dicit insuper quod prædicti
 "auditores venire fecerunt coram eis juratores præfata assise in forma
 "certificationis, et ipsos juratores per sacramentum suum re-examinave-
 "runt, et admiserunt veredictum eorum contrarium veredicto per ipsos
 "prius pronuntiato; unde dicit, quod in iis et alijs erratum est, &c."

To this the prior replied, that Martin had been "præmunitus per
 "breve quod vocatur scire facias; et quod prædicti auditores habue-
 "runt plenam potestatem, tam per breve domini regis, quam per specielle
 "præceptum domini regis, ad corrigenda recorda iusticiariorum vitiata
 "et erronea inventa; et hoc satis constat domino regi et ipsius consilio,
 "et quod prædictus Martinus non recuperavit per grossum veredictum;
 "quia non fuit ibi veredictum nisi tale quale imperfectum, quia per
 "XI. juratores captum; et quod prædicti auditores non admiserunt
 "contrarium veredictum priori veredicto, quia veredictum prius captum
 "coram J. de Lovetot fuit tale quale imperfectum, et contra legem
 "terre captum per XI. juratores, de statu sanguinis ultra tempus
 "limitatum; secundum veredictum magis deberet dici suppletio prioris
 "veredicti defectivi, quam eidem contrariari." To which Martin
 rejoined and insisted, "quod prædicta assisa fuit plena et perfecta
 "coram

from the danger of an attaint, find it **SPECIALLY**; that so it may be decided in that court where the verdict is returnable (u). And if the judge overrule the point of law, contrary to law, whereby the jury are persuaded to find a general verdict—which yet they are not bound to do, if they doubt it,—then the judge, upon the request of the party desiring it, is bound by law, in convenient time, to seal a bill of exceptions, containing the whole matter excepted to; that so the party grieved, by such indiscretion or error of the judge, may have relief by writ of error, on the statute of Westminster 2.

(u) The danger of an **ATTAINMENT** is now merely imaginary; nor need the jury, unless perhaps in criminal or important civil cases, find **SPECIALLY**; the courts of law having of late years, to forward the ends of justice, been accustomed, on motion, to grant **NEW TRIALS**, where the jury, or the judge, have been mistaken, or misled. 4 Bur. 2108. 3 Bur. 1669. This mode was introduced about the middle of the seventeenth century. 10 Mod. 202, but is now carried to an immoderate excess.

"coram J. de Lovetot et sociis suis iustic. capta, et hoc liquet expresse in eodem recordo, ubi dicit jurati dicunt, &c. Et quod ipse recuperavit prædicta tenementa per grossum veredictum præfate assise, petitiæ iudicium, si prædictum grossum veredictum super diffinitione prædictæ facta aliquo modo secundum legem et consuetudinem regni Angliæ debet adnichillari, absque brevi de attincta, &c."

The judgment in this case does not appear, but it seems, that the reason why the record of the verdict is said to be imperfect, was not because all the twelve did not agree, but because the *dicta utriusque partis* were not distinctly specified and recorded, which is declared to be the usage in such case; "*prout moris est in tali casu.*"

Is it possible to contend after this, that the trial by **TWELVE** jurymen was thoroughly introduced, or are there any passages, in the old historians, which clearly prove it to have been so established, before the time of Henry the Third (c)?

(c) Barr. on stat. 31.

FOURTEENTHLY, although upon general verdicts given at the bar in the courts at Westminster, the judgment is given WITHIN FOUR DAYS, in presumption that there cannot be any considerable surprize in so solemn a trial, or at least it may be soon espied ; yet upon trials, by *nisi prius*, in the country, the judgment is not given presently by the judge of *nisi prius*, unless in cases of QUARE IMPEDIT : but the verdict is returned, after trial, into that court from whence the cause issued ; that thereby, if any surprize happened, either through much business of the court, or through inadvertency of the attorney, or counsel ; or through any miscarriage of the jury ; or through any other casualty ; the party may have his redress in that court from whence the record issued.

AND thus stands this excellent order of trial by jury ; which is far beyond the trial by witnesses, according to the proceedings of the civil law, and of the courts of equity, both for the certainty, the dispatch, and the cheapness thereof. It has all the helps to investigate the truth that the civil law has, and many more. For, as to certainty,

FIRST, it has the testimony of witnesses, as well as the civil law, and equity courts.

SECONDLY, it has this testimony in a much more advantageous way than those courts, for discovery of truth.

THIRDLY, it has the advantage of the judge's observation, attention, and assistance, in point of law by way of decision, and in point of fact by way of direction to the jury.

FOURTHLY,

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FOURTHLY, it has the advantage of the jury, and of their being *de vicineto*; who oftentimes know the witnesses and the parties (x): and,

FIFTHLY, it has the unanimous suffrage and opinion of twelve men; which carries in itself a much greater weight and preponderation, to discover the truth of a fact, than any other trial whatsoever.

AND as this method is more certain, so it is much more expeditious and cheap. For oftentimes the session of one commission for the examination of witnesses, for one cause, in the ecclesiastical courts, or courts of equity, lasts as long as a whole session of *nisi prius*, where a hundred causes are examined and tried.

AND thus much concerning trials in CIVIL CAUSES. As for trials in causes criminal, they have this further advantage, that regularly the accusation, as preparatory to the trial, is by a GRAND JURY (y). So that as no man's interest, according to the course of the common law, is to be tried or determined without the oaths of a jury of twelve men; so no man's life is to be tried but by the oaths of twelve men, and by the PREPARATORY ACCUSATION or indictment by twelve men, or more, PRECEDENT to his trial; unless it be in the case of an appeal, at the suit of the party (z).

(x) The jury now only come *de corpore comitatûs*, and not *de vicineto*. See 4 & 5 Ann. c. 16.—24 Geo. 2. c. 18. and note [B] on this chapter.

(y) As to a grand jury, consult Hale's *Historia Placitorum Coronæ*—Hawkins's Pleas of the

Crown, and the twenty-third chapter of the fourth book of Blackstone's Commentaries.

(z) Mr. Justice Blackstone conceives that there are some few defects in this mode of decision, and which he enumerates in the conclusion of the twenty-third

third chapter of the third book of his Commentaries. But should those defects continue unremedied and unsupplied, "still, (continues this learned judge), with all its imperfections, I trust that this mode of decision will be found the best criterion, for investigating the truth of facts, that ever was established in any country." "The only complaint I have ever heard uttered against it (says De Lolme) has been by men, who, more sensible of the necessity of public order, than alive to the feelings of humanity, think that too many offenders escape with impunity."

And as this method is more certain, so it is much more expeditious and cheap. For oftentimes the session of one commission for the examination of witnesses, for one cause, in the ecclesiastical courts, or courts of equity, lasts as long as a whole session of a common law court, where a hundred causes are examined and tried.

END OF THE HISTORY OF THE COMMON LAW OF ENGLAND.

And thus much concerning trials in civil causes. As for trials in causes criminal, they have this further advantage, that regularly the accusation is preparatory to the trial, is by a grand jury (i. e. by a jury of twelve men, according to the course of the common law, to be tried or determined without the oath of a jury of twelve men; to be tried by the twelve men, and by the PREPARATORY ACCUSATION or indictment by twelve men, or more, PREPARATORY to his trial; while it be in the case of an appeal, at the instance of the party (c).

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With preceding
AN
ANALYSIS
OF THE
CIVIL PART
OF THE
LAW.

BY
SIR MATTHEW HALE.

THE FIFTH EDITION.

Of all the schemes hitherto made public for digesting the Laws of England, the most natural and scientific of any, as well as the most comprehensive, appeared to be that of Sir MATTHEW HALE, in his posthumous "Analysis of the Law."

Mr. Justice BLACKSTONE's Pref. to his Anal.

THE
AUTHOR'S
PREFACE.

IN the ensuing TRACTATE, I shall make an essay of reduction of the several titles of the law into distributions and heads according to an analytical method ; but the particulars thereof are so many, and the connections of things so various therein, that as I shall before-hand confess that I cannot reduce it to an exact logical method, so I must declare that I do despair at the first, yea, the second or third essay, to reduce all the considerable titles thereof under this method. But many

THE PREFACE

things will be omitted, and possibly therefore, as they shall occur to my memory, will perchance be disorderly shuffled in under such of the distributions as may not be so proper for them,—or at least inserted brokenly, without their just dependance,—till upon a second or third, or, perhaps, further essay, the scheme or abstract may be entirely new framed.

HOWEVER, the following essay will do thus much good.

FIRST, it will discover that it is not altogether impossible, by much attention and labour, to reduce the Laws of England at least into a tolerable method or distribution.

SECONDLY, it will give opportunity both to myself and others, as there shall occur new thoughts or opportunities, to rectify and to reform what is amiss in this, and to supply what is wanting; whereby, in time, a more methodical system or reduction

THE PREFACE.

reduction of the titles of the law, under method, may be discovered.

THIRDLY, that although, for the most part, the most methodical distributors of any science rarely appear subtle or acute in the sciences themselves;—because, while they principally study the former, they are less studious and advertent of the latter;—yet a method, even in the common law, may be a good means to help the memory to find out MEDIA of probation, and to assist in the method of study.

AND although the laws of England are generally distributed into the common law, and statute law, I shall not distribute my Analysis according to that method, but shall take in and include them both together, as constituting one common bulk or matter of the laws of England. Nor shall I confine myself to the method, or terms, of the civil law, nor of others who have given general schemes and analyses of laws; but shall use that method, and those words or expressions, that I shall think most conducive to the thing I aim at.

THE PREFACE.

THE laws of this kingdom do respect either,

Civil rights; or,

Crimes and misdemeanors.

THIS I shall substitute as the general matter of the Laws of England; not troubling myself with criticisms or propriety of words, in which respect the very word CIVIL includes also matters criminal; because civil constitutions give the denomination of crimes, and the rules and method of their punishment: but it shall be sufficient that I use such expressions as either are in themselves proper to express the thing I mean, or that, by my usage and application of them, I render serviceable to that purpose and end.

I SHALL therefore divide the Laws of this kingdom, in relation to their matter, into two kinds.

I. THE civil part, which concerns civil rights, and their remedies.

2. THE

THE PREFACE.

2. THE criminal part, which concerns crimes and misdemeanors:

AND these, to avoid confusion, I shall dispose into several Sections.

AND first, I begin with the Law as it relates to civil matters.

THE PRINCE

At the central part, which concerns the
and the

And there, to avoid confusion, I shall divide
into several sections.

And thus, I begin with the law as it relates to
civil matters.

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THE ANALYSIS

OF THE

LAW.

SECT. I.

Of the civil part of the law, IN GENERAL.

THE civil part of the law concerns,

Civil rights or interests :

Wrongs or injuries relative to those rights :

Relief, or remedies applicable to those wrongs.

Now all civil rights, or interests, are of two sorts;—

Jura personarum, rights of persons: or,

Jura rerum, rights of things.

The civil rights of persons are such as do either,

Immediately concern the persons themselves: or,

Such as relate to their goods and estate.

As to the persons themselves, they are either,

Persons natural; or,

Persons civil or politic; i. e. bodies corporate.

[2] THE ANALYSIS OF THE LAW.

Persons natural are considered two ways:

Absolutely and simply in themselves; or,

Under some degree or respect of relation. Vide Sect. II.

In persons natural, simply and absolutely considered, we have these several considerations, viz.

The INTEREST which every person has in himself.

Their CAPACITIES, or ABILITIES, which respect their actions.

The interest which every person has in himself, principally consists in three things, viz.

The interest he has in the safety of his own person.

And the wrongs that reflect upon that, are, assaults—affrays—woundings.

The interest he has in his liberty, or the freedom of his person. The injury whereto, is duress, and unlawful imprisonment.

The interest he has in his name and reputation. The injury whereto is scandal and defamation.

As to the other interest of goods and estate, though in truth they have a habitude, and are under some respect to the person; yet because they are in their own nature things separate and distinct from the person, they will more properly come in under *jura rerum*. Vide Sect. XXIII. &c.

The CAPACITY that every person has, which is a power that THE LAW variously assigns to persons, according to the variety of certain conditions, or circumstances, wherein they are; either TO TAKE OR TO DISPOSE.

And under this head we have,

First, the capacities themselves, which are especially two;

Capacities which a man has in his own right:

Capacities which he has *in autre droit*, or another's right.

Now

THE ANALYSIS OF THE LAW. [3]

Now capacities which a man has in his own right, are either,—

To acquire or take;

To alien or transfer.

And both these are either,

Of things personal;

Of things real.—

The second kind of capacities are *IN AUTER DROIT*,—another's right; as executors, corporations, *cistuy que use*, &c. whereof hereafter.

The various conditions or circumstances of persons, with relation to those capacities, consisting of,

Ability,

Non-ability.

And all persons are presumed in law able in either of those former capacities of taking, or disposing, who by law are not disabled: and those that are so disabled come under the title of non-ability, though that non-ability is various in its extent, viz. to some more, to some less; as in the several instances following.

ALIENS: here comes in the learning of aliens, as naturalization, denization, &c.

ATTAINED of treason or felony; here of attainders.

Persons **OUTLAWED** in personal actions.

INFANTS;—here of the non-ability of infants.

FEME COVERTS; here of their disability.

IDEOTS and LUNATICS; here of that learning.

Persons under some **ILLEGAL** restraint or force, as duress, maners.

VILLEINS (now antiquated).

BASTARDS; and here of legitimation.

Bacon's Hist. part I. p. 88. Vide § xiv.

Vide § xviii.

[4] THE ANALYSIS OF THE LAW.

S E C T. II.

Of the relation of persons, and the rights thereby arising.

NOW as to persons considered in respect of relation, the rights thereby arising are of three kinds, viz.

Political,

Economical;

Civil.

The political relation of persons, and the rights emergent thereupon are,

The magistrate ;

The people or subject.

The magistrate is either,

Supreme ;

Subordinate.

The supreme magistrate is either,

Legislative: THE PARLIAMENT. (With whose rights I shall not here intermeddle.)

Executive: THE KING.

And inasmuch as the king is by the law the head of the kingdom and people, the laws of the kingdom, *eo intuitu*, have lodged in him certain rights, the better to enable him to govern and protect his people. And although under this consideration I shall be constrained to take in and include many rights of things; yet because they do belong to the king under this relation, AS KING, and I have no other place or division so apt to dispose of them as this, I shall here bring them in together.

And the rights that belong to the king, as king, are of two kinds;

Such rights as concern his person :

Such rights as concern his prerogative.

Of each of these in their order.

S E C T.

S E C T. III.

Of such rights as relate to the king's person.

THE rights which more immediately concern the king's person, include these two things, viz.

The manner of his title, or acquett thereof.

The capacities of the king.

The manner of acquett of the regal title, or dignity, is either,

A lawful acquett; or,

An unlawful acquett.

An hereditary acquett of title is by the municipal laws and constitutions of this kingdom, when the crown descends to the next of blood, according to the laws and customs of England in cases of hereditary descents.

And here all those rules that have been observed in the law touching this point, may be inserted.

An unlawful acquett of the regal title is,—

By usurpation; when a subject by wrong invades the crown, or intrudes upon him who has the lawful right thereto; as was done by king Stephen, king John, Henry the fourth, and Richard the third.

And herein may be considered what power the law allows to such an usurper, and what it denies him.

By conquest; when a foreigner either,

Vanquishes the king, as William the first did ^{Victoria} in regem.

Harold.

Or subjects the kingdom; which never hap- ^{Victoria} in popu-
pened with respect to England since the ^{lum.}

Romans.

[6] THE ANALYSIS OF THE LAW.

The king's capacity, as he is king, is of two kinds.

His political capacity.

His natural capacity.

As to his political capacity; he is A SOLE CORPORATION, of a more transcendent nature and constitution than other corporations; whereby he is discharged from many incapacities, which in the case of other persons would,—

Obstruct his succession, as alienage, &c.

Disable his actions, as infancy, or coverture in the case of a queen, &c.

Then, as to his natural capacity, as he is king: the great concerns of government requiring a great assistance to the king's natural capacity, the laws and customs of the kingdom have furnished him with divers assisting councils, which are of two kinds, viz.

His ordinary councils.

His extraordinary councils.

His ordinary councils are three, viz.

Privatum concilium, his privy council.

And here may be taken in, all such laws as direct, bind, or limit, the privy council; either,

In matters of public interest touching the king;

Or in matters of private interest between party and party.

Legale concilium, or his council at law; which consisting of the lord chancellor, lord treasurer, lord privy seal, judges of both benches, barons of the exchequer, master of the rolls, &c. is the king's council of advice in matters of law.

Concilium militare, his council in time of war, or public hostility, viz.

In matters at land, } earl constable.
 } earl marshal.

In matters at sea, the lord admiral.

The jurisdiction of whom, vide *post*.

The

THE ANALYSIS OF THE LAW. [7]

The king's extraordinary councils are of two kinds;

Secular, or, temporal:

Ecclesiastical, or, spiritual.

The king's extraordinary secular councils are, the house of peers; the house of commons; in their capacity of informing, advising, and counselling the king in matters that are,

Public benefits;

Public grievances.

And here all the learning of parliaments properly comes in, viz. the persons of whom it consists; the members of each house; the manner of their summons; the places that send members to the house of commons; and how to be qualified; how elected; the qualifications of the electors; what the privileges of parliament are; the method of passing bills, &c. and how adjourned, prorogued or dissolved.

The extraordinary ecclesiastical councils are,

The upper house

The lower house

} of convocation.

And hither may be referred all laws and constitutions touching the convocation.

S E C T. IV.

Concerning the prerogatives of the king.

HAVING shewn you what rights belong to the king's person, we come now to those rights which concern his prerogative.

And those prerogatives are of two kinds:

Direct and substantive prerogatives.

Incidental and relative prerogatives.

The direct and substantive prerogatives may be distributed under three branches, viz.

Jura majestatis, vel summi imperii, i. e.

The right of dominion.

Potestas jurisdictionis, vel mixti imperii, i. e.

The power of jurisdiction

Census Regalis, or, the royal revenues.

Which I shall subdivide according to their order.

See the incidental and relative prerogatives in Sect. IX.

S E C T. V.

Concerning the king's rights of dominion or power of empire.

THE *jura summæ majestatis*, or rights of the king's empire or dominion, are either,
In relation to his own subjects; or,
In relation to foreigners.

In relation to his own subjects, they respect,

Times of peace.

Times of war.

And first of the rights of dominion, which respect times of peace.

These rights, though they are exercisable also, in times of war and insurrection, yet seeing they do more immediately respect the well-ordering of a kingdom, and preserving its peace and tranquility, I shall here insert them. And though they are various in their kinds, and some of them seem to refer to the powers of jurisdiction, yet I shall endeavour to reduce them to these eight heads following, viz.

His rights in relation to the laws.

In relation to tributes and public charges.

In relation to the public peace of the kingdom.

In relation to public injuries and oppressions.

In relation to public annoyances.

In relation to his constituting the great officers of the kingdom.

In relation to his ordering and regulating trade and commerce.

In supervising, regulating, and supplying the defects of others.

First, in relation to the laws of this kingdom:

In the making of laws.

In the relaxation of laws.

[10] THE ANALYSIS OF THE LAW.

As to the making laws, his right consists in three particulars:

In the making of statute laws, or acts of parliament; for though the king cannot make such laws himself without the consent of both houses of parliament, yet no law can be made to bind the subject without him.

In the making of spiritual laws, or canons ecclesiastical, which, if kept within the bounds of ecclesiastical concordance, are admitted here in this kingdom: as these laws cannot be made without the king's consent, so neither can the king ordain such laws without the clergy in convocation assembled.

So that in both these kinds of laws, the king's power of making is only a qualified and co-ordinate power. But, In making and issuing of proclamations, which in some instances are to be taken for laws, as in calling parliaments, declaring war, &c. herein the king's power is more absolute, as being made by him alone; yet the king cannot by these introduce a new law, so as to alter or transfer properties, or impose new penalties or forfeitures beyond what are established by statute or common law.

And as to his power in the relaxation of laws already made, it respects either,

Temporal laws; which being enacted by parliament, the king cannot abrogate or annul such a law: but in some cases of penal laws, he may, in respect of persons, times, or places, sometimes DISPENSE with them (a).

Here may come in all the learning touching dispensations and *non obstantes*.

Ecclesiastical laws, wherein the king has a greater latitude

(a) The dispensing power of the crown was abolished at the time of the Revolution. Hume's Hist. 8 v. oct. 240, 244, 245, 247, 249. Blac. Com. 1 v. oct. 142, 186, 342. 4 v. oct. 436, 440. 1 W. & M. ft. 2. c. 2.

THE ANALYSIS OF THE LAW. [11]

of dispensation; for if such laws are not confirmed by parliament, the king may revoke and annul them AT HIS WILL and pleasure.

And here all the learning of commendams, *dispensationes ad plura*, and all ecclesiastical defects and incapacities dispensed with by the king, fall under consideration.

Secondly, in relation to tributes and public charges, wherein is considered,

What charges he cannot impose without consent of parliament; and for this, see the statute De Tallagio non Concedendo, and divers other statutes, restraining new impositions.

What charges he MAY impose without consent of parliament, viz. reasonable tolls; as pavage, pontage, murage, &c.

And here may be considered the lawfulness of tolls, &c.

And of exemptions	} {	By prescription,
from them,		By charter.

Thirdly, in relation to the public peace of the kingdom.

1. In preserving it from being broken;

By inhibitions from going, or riding armed.

By erecting or razing castles and fortifications.

By prohibiting such erections by others.

2. In restoring it when broken:

By suppressing affrays and tumults WITH FORCE.

By a legal prosecuting and punishing such affrayors.

Fourthly, in relation to public injuries and oppressions.

By restraining them by imprisonment.

And herein consider by whom, where, when, and how, this may be done.

By prosecuting them in the king's name;

By indictment.

By information.

By

[12] THE ANALYSIS OF THE LAW.

By pardoning them, as to the king's prosecution.

And herein, of pardons, what may be pardoned, when, how, and by what words, &c.

Fifthly, in relation to public annoyances: for the king has the great care thereof; and the prosecution and punishment of the same, as far as they are public, is by law committed to him.

And this is commonly exercised about bridges, ferries, highways, &c.

Though these particulars, and some of the foregoing, more regularly come in under pleas of the crown, and criminal matters, in the Second Part of this Treatise.

Sixthly, in relation to his constituting great officers, viz.

CIVIL OFFICERS, as lord chancellor, treasurer, privy-seal, earl marshal, lord admiral, judges, &c.

And here may be considered,

The manner of their constitution.

Their office, business, or employment.

ECCLESIASTICAL OFFICERS, as archbishops, bishops, deans, archdeacons, &c.

And here may come in,

The manner of their constitution;—as their election, consecration, investiture, restitution of temporalities, &c.

The exercise of their office; viz. how far the king may enlarge, limit, or restrain it.

Seventhly, in relation to the regulation of trade and commerce.

1. His right of $\left\{ \begin{array}{l} \text{Coining new monies,} \\ \text{Authenticating foreign coin.} \end{array} \right.$

And here comes in all matters touching the variety and legality of coins; and of contracts, orders, and instructions, relating to it.

2. His designation of places of public commerce;
As ports, fairs, markets.

And

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And here of such various learning as relates thereto;

As how they are created { By charter.
 By prescription.

What is a good grant thereof, and what not, if granted to the prejudice of another; and of the writ *Ad Quod Damnum*.

Also what is a sale in market overt, and of the effects thereof in altering properties, &c. and of forestalling, as when a market may be forestalled, and when not.

3. His right in instituting and regulating the instruments of public commerce, with respect to

Undue { Weights.
 Measures.

Excessive prices, &c.

Eighthly, in relation to his supervising, regulating, and supplying the neglects or defects of other magistrates;

Of CIVIL magistrates { By writs of error.
 By writs of appeal, &c.

Of ECCLESIASTICAL magistrates; by devolution.

Of causes, by appeal to him.

Of presentations, by lapse.

Thus far of the king's prerogatives, with respect to peace; next to those that relate to war and commotions.

These may be termed *jura militiae*, and consist,

In raising men.

In building forts.

And regard either,

Domestic insurrections of his subjects: or,

Foreign hostilities of enemies.

With regard to his subjects,

He may raise men to suppress their insurrections by force.

He may punish them by martial law during such insurrection or rebellion, but not after it is suppressed.

In

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In relation to foreigners:—these rights are to be considered,
viz.

The power of denouncing war, and concluding peace.

And herein leagues and truces may be considered, with
their various effects.

Also what shall be said an enemy.

The authorizing of,

Public envoys;

Ambassadors; and,

Plenipotentiaries.

The power of granting or issuing letters of marque and
reprizal.

And herein consider the inducements, ends, and effects
thereof.

The power of granting safe-conducts.

And here of the uses and effects thereof.

S E C T. VI.

Of the potestas jurisdictionis; or the king's right or power of jurisdiction.

HITHERTO of the *jura summi imperii*, or rights of empire or dominion; now we come to the *jura mixti imperii*, or *potestas jurisdictionis*, wherein the king generally acts by his delegates, officers or representants.

This *potestas jurisdictionis*, or power of jurisdiction, seems principally to be of two kinds, viz.

Extraordinary.

Ordinary.

The extraordinary power of jurisdiction residing in the king, though for the most part exercised by his officers and ministers, consists in three things;

In commanding home any of his subjects from foreign parts;

In prohibiting any of his subjects from going beyond the seas:

1. By proclamation.

2. By the special writ of *Ne Exeat Regnum*. 2 Inst. 47,

In commanding any of his subjects to undertake an office or dignity within the realm. 48.

And here the learning touching these may be inserted, as where, when, and how these commands or instructions are to issue; and when, and in what cases NOT; what the penalty if not obeyed, and in what manner inflicted.

The

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The king's ordinary or usual power of jurisdiction, is of two kinds :

Ecclesiastical.

Temporal or civil.

Ordinary ECCLESIASTICAL jurisdiction, or rather jurisdiction touching ecclesiastical matters, anciently belonged to the crown, but was for some time usurped by the pope ; so by the statute of 26 Hen. VIII. it was again restored to the crown.

And this is of two kinds ;

Voluntary jurisdiction.

Contentious jurisdiction.

Ecclesiastical VOLUNTARY jurisdiction may be exercised by the king in several instances relating to ecclesiastical matters : as,

In convening ecclesiastical assemblies, as synods, convocations, &c.

In such acts of voluntary ecclesiastical jurisdiction, wherein the king has a power to concur with the ordinary.

And in many cases, to do what the ordinary cannot do ; as in constituting appropriations, uniting of churches, erecting ecclesiastical benefices or dignities, dispensing with irregularities, exempting from ecclesiastical jurisdiction, with relation to his free chapels ; in pardoning crimes relating to ecclesiastical jurisdiction, and the execution of their sentences, WHEREIN A PRIVATE INTEREST IS NOT CONCERNED ; in suspending the effects of their sentences (even) in causes criminal ; and an infinite more of the like nature.

This is a large field full of many titles, and of various learning.

As

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As to ecclesiastical CONTENTIOUS jurisdiction: it is true, the king meddles not with it as to the exercise thereof; for that would be both an injury to the excellency of his majesty, and also a wrong to the subjects in depriving them of their right of appeal; if there be cause for the same; for if the king should be the judge upon the FIRST instance, the party cannot afterwards appeal.

And therefore in cases of ecclesiastical CONTENTIOUS jurisdiction, his power is exercised by way of INTERPOSITION, in three instances, viz.

By his power { *Jurisdictionem ordinariam, et jurisdictionem delegatam,*

To commissioners of his own nomination under the great seal.

By suspending their proceedings; which is done, not by his immediate authority, but by the administration of his temporal courts, who, by a power derived from the king, suspend their proceedings BY PROHIBITION;—if there be cause.

By the last devolution of appeal; wherein, though the king himself does not judge IN PERSON, yet he appoints commissioners under the great seal to receive and determine the appeal.

And thus much of the king's ecclesiastical jurisdiction.

Now as to the TEMPORAL OR CIVIL jurisdiction of the king: this, as well as his ecclesiastical jurisdiction, is of two kinds, viz.

Voluntary.

Contentious.

His voluntary TEMPORAL jurisdiction consists,

In erecting of courts by his great seal; so that they be courts of the common law; for a court of equity CANNOT be now erected, but by act of parliament.

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In the erection and collation of,
Jurisdictions.
Regalities.
Liberties.
Franchises.
Exemptions.
Privileges : and,
Dignities.

In erecting and collating of jurisdictions, viz.

Exempt jurisdictions.

Non-exempt jurisdictions.

Exempt jurisdictions ; as the jurisdiction of counties palatine, jurisdiction not to be impleaded *extra muros*, consanguinity of pleas, &c.

Non-exempt jurisdictions ; as leets, tithes, power to hold pleas, &c.

In the collation of regal powers ; as of coining money, pardoning offenders, constituting justices, &c.

But see how far these are resumed by stat. 28 Hen. VIII.

In the collation of liberties ; as forests, parks, chases, warrens, ferries, gaols, return of writs, ports of the sea, fairs, markets, tolls, and many others of like nature.

In the collation of franchises ; as creating of free boroughs, giving power of sending burgesses to parliament, creating and dividing counties, erecting of corporations.

In exemptions of all kinds ; as from suit at the county, tithes, or hundred court ; also from serving on juries, and from paying tolls, customs, subsidies, &c.

In the collation of privileges ; as endowment of aliens, privileges against arrests and imprisonment, and enfranchising villeins by his presence formerly.

In

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In the creation and collation of dignities; as dukes, marquisses, earls, viscounts, barons, &c.

And thus far of the king's temporal voluntary jurisdiction.

As to the king's temporal CONTENTIOUS jurisdiction before-mentioned, this is not exercised by the king in his own proper person, for the reasons before given in the head of ecclesiastical contentious jurisdiction; for though instances have been of the king of England sitting in the court of king's bench, and though the stile of that court is *coram rege*, and the chief justices there were anciently called *locum tenentes domini regis*, yet, when the king sat there in person, the judgment or opinion of the court was always given by the justices.

The king always exercises this contentious temporal jurisdiction by his judges or justices, which he creates or constitutes four ways :

By WRIT, as the chief justice of the king's bench.

By PATENT, as the ordinary judges of the established courts at Westminster.

By COMMISSION, as justices of *oyer and terminer*, gaol-delivery, assize, and *nisi prius*. Vide *infra*.

By CHARTER, as the judges in courts of corporation and inferior courts (*b*).

(*b*) To maintain both the dignity and independence of the judges in the superior courts, it is enacted by 13 W. III. c. 2. that their commissions shall be made (not, as formerly, and in the time of sir Matthew Hale, DURANTE BENE PLACITO, but) QUANDIU BENE SE GESSERINT, and their salaries ascertained and established. But see 1 Geo. III. c. 23. and Blac. Com. 1 v. oct. 167.

S E C T. VII.

Concerning the census regalis; or, the king's royal revenue (c).

I COME now to speak of the CENSUS REGALIS, or the king's royal revenue; and here I shall not say much of his houses, manors, lands, fee-farms, or free rents, because these are common to him with other persons; but I shall only speak of his royal revenue, or CENSUALES PRÆROGATIVÆ, and that CENSUS REGALIS, of which the law takes notice as of common right belonging to him, AS HE IS KING.

And the kinds of those revenues are two, viz.

Ecclesiastical.

Temporal.

His ecclesiastical revenues are of two kinds:

Extraordinary.

Ordinary.

His extraordinary revenues ECCLESIASTICAL are those subsidies and tenths, and other ecclesiastical supplies granted occasionally by the clergy in their several convocations.

Note, In those OCCASIONAL supplies the law takes notice, that the king has an inheritance, though depending upon the bounty of his subjects, and therefore he may grant an exemption from them: as likewise he may do to particular persons from temporal subsidies, hereafter-mentioned, for the same reason.

(c) As to the royal revenue, upon the footing on which it AT PRESENT stands, see the eighth chapter of the first book of Blackstone's Commentaries.

His

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His ordinary revenues ECCLESIASTICAL are likewise of two kinds :

Constant, or annual.

Contingent, or casual.

The constant or annual revenue ecclesiastical is his tenths of ecclesiastical benefices, extra-parochial tithes, and some other things of ecclesiastical nature, that possibly might come to him by the dissolution of monasteries.

Hither may be referred proxies, (procurations,) pensions, tithes, appropriations, &c.

The casual, or uncertain, ecclesiastical revenues are,

His first-fruits of all the ecclesiastical benefices; settled in him by stat. 26 Hen. VIII.

The temporalties of bishops; which though they are in the crown by reason of the king's right of patronage, yet I may call them SPIRITUAL, because they are part of the revenues of an ecclesiastical corporation: and on the same reason,

Corrodies also; as being of the foundation of ecclesiastical corporations.

And also lapse itself; which though it be not reckoned a revenue, because not to be sold, yet it is EQUIVALENT to a revenue; for it yields a preferment for his clerk.

S E C T. VIII.

Of the king's temporal revenue.

I COME now to that part of the king's *census regalis* which I call TEMPORAL: and this is likewise of two kinds;

Extraordinary,

Ordinary.

The extraordinary TEMPORAL revenue may be further divided into,

The ancient.

The modern.

The ancient temporal extraordinary revenues are of several kinds, as,
Rushw. col. vol. i. p. 481. Hidage, cornage, scutage.

Aids: *ad corpus redimendum, ad filium primogenitum militem faciendum, ad filiam primogenitam maritandam.*

The modern are the subsidies and supplies granted by parliaments.

The ordinary *census regalis TEMPORALIS* is also of two kinds, viz.

Common.

Special.

The COMMON *census regalis temporalis* is either, certain, or casual.

Certain; as his rents and demesnes; which are either,

Newly acquired by dissolution, surrender, exchange :
or,

Ancient ;

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Ancient; as, *antiqua dominia coronæ*, i. e. ancient demefnes.

Here insert what they were, what the tenants privileges were, &c.

The CASUAL ordinary temporary revenues; as, profits of his tenures, and the like.

The SPECIAL ORDINARY *census regalis* in its original was annexed to the crown for the support of the kingly state and dignity; this is of several kinds, viz.

Purveyance, or buying at the king's price; which is since taken away (d).

Prisage, i. e. one tun of wine for every ten tuns laden in every ship; and from aliens, in lieu thereof, two shillings for every tun.

Here add who are exempted from prisage, &c.

Customs, great and small, *magna & antiqua custuma*.

Bona vacantia, as waifs, strays, *wreccum maris*.

Royal fish, as whale and sturgeon.

Bona forisfacta, vel confiscata; as,

Bona felonum, vel felonum de se.

Bona fugitivorum.

Bona utlagatorum, & in exigendis positorum.

Royal escheat: as

Terræ Normannorum.

Terræ Alienigenorum.

Terræ Preditorum.

a Inst. p.
576, 577.

Royal mines.

Maritime increase, by reason of *illuvio maris*.

Profits of his courts; as,

His fees of the seal.

Fines upon original writs.

Post-fines, or fines *pro licentiâ concordandi*.

(d) Vide 12 Car. II. c. 24.

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Fines for misdemeanors, and those are either common or royal.

Common fines on vills, townships, or hundreds, for the escape of murderers, felons, and the like,

Wile § 1. Amerciaments.

Custody of ideots and lunaticks lands :

The latter upon account, not so the former.

Profits of his forests,

Treasure trove.

SECT.

S E C T. IX.

Of the relative prerogatives of the crown.

THUS far I have gone with the direct or substantive prerogatives of the crown; now I come to those that are dependant and relative: which are of several kinds, viz.

The prerogatives,

Of his PRESENCE, in relation to breach of the peace, seizure of villeins, arrests, &c.

Of his POSSESSIONS;—that no man can enter upon him, but is driven to his suit by petition. And here of traverse, *monstrans de droit, amoveas manus*, &c. when, in what cases, and how to be brought.

Of his DEMESNES; and the exemptions of ancient demesne rights. Vide supra, f. 8.

Of his grants, how to be expounded.

Of his suits; as,

In what courts, and election of courts,

In what writs,

In his process.

In his pleadings.

In his judgments.

In his executions.

Of his DEBTORS AND ACCOUNTANTS, in their debts and accounts.

In relation to his TREASURE, and of his officers employed therein.

In relation to persons RELATED to him; as, his queen consort; and here of her separate capacity, her revenue, *aurum reginae*.

His

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His children; his eldest son, eldest daughter, &c.

His ministers attending his person, or his courts, or
his public service.

And herein,

Of privilege.

Of protection.

And thus I have gone through the analysis, or scheme of the king's prerogative; by which, tho' it be but hastily and imperfectly done, may be seen, of what vast dimension this one, though GREAT title of the law is, and what a vast number of great and considerable titles fall into it; inso-much that if I should pursue any one of these subordinate titles, though it might seem but narrow, and here expressed but by a word or two, as wreck, waif, toll, custom, &c. there is not one of these, but in the bare analysis of it, and of the several incidents and rivulets that would be found to fall into it, would grow as large as the brief abstract of this great head has done, and it may be much larger; as the capillary veins and arteries in the body take up more room and extension than the great trunks, out of which their small ramifications are drawn.

SECT. X.

Of the SUBORDINATE magistrates: and first of ecclesiastical.

THUS far of the supreme magistrate; and of the rights annexed to him by reason of his office. The next consideration is of SUBORDINATE magistrates, which shall consider in the same method as the former, viz. not only in their own persons, but also in those rights they have annexed to them by reason of their offices or magistracy.

All subordinate magistracy is derived from the supreme, either immediately or mediately; either by express grant from him, or by something that implies or supposes it in its original; viz. custom or prescription. And this magistracy may be distinguished into these kinds, viz.

Magistrates ecclesiastical.

Magistrates temporal.

Ecclesiastical magistrates; such, namely, as have a jurisdiction annexed, are of two kinds;

Ordinary.

Extraordinary.

The ordinary ecclesiastical magistrates are also of two kinds, viz.

Such as have ecclesiastical jurisdiction annexed to their places and offices PRIMARILY and originally; as archbishops, bishops, archdeacons.

Such as have their jurisdiction by substitution and delegation from THEM, as chancellors, officials, surrogates, vicars general, guardians of the spiritualities, &c.

The

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The extraordinary ecclesiastical magistrates, are certain persons appointed by the king's commission for hearing and determining matters of ecclesiastical consueance; the king being supreme head in matters ecclesiastical. And this is either,

In the first instance, such as were anciently commissioners in matters ecclesiastical, either *ad universalitatem causarum*, or in particular cases,

In the second instance, as commissions of appeal, and of review.

And because those magistrates have ecclesiastical jurisdiction annexed, here might be brought in the whole particulars thereof, and amongst them principally these, viz.

In matters of crime, as adultery, fornication, incest, &c.

In matters of interest, as,

De testamentis & administrationum commissione.

Here of that matter.

De matrimonio & divortio: and here, who may marry; what is a lawful marriage; the kinds of divorces, and their consequences or effects;

In dissolving, or not.

In bastardizing, or not.

In cases of general bastardy, when written to by the TEMPORAL courts,

In cases of tithes,

In cases of dilapidations.

In cases of ability of clerks, institution, destitution, or deprivation, suspension, sequestration, &c. of ecclesiastical benefices.

Of the difference between jurisdiction VOLUNTARY, as admissions, institutions, probate of wills, commission

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mission of administrations, and CONTENTIOUS jurisdiction.

Of their sentences and coercion, namely, excommunication, and the effects thereof, in reference to,
Disabling the party.

Imprisoning the party.

The method of RESTRAINING the exceeding of their jurisdiction ;

By prohibitions.

By *præmunire*.

The means of redressing their errors,

By appeal: the method and effects thereof.

Of the several courts belonging to their several jurisdictions ; as,

To archbishops, their court of audience, prerogative court, and court of arches.

To bishops, their several consistories, and chanceries, their chancellors, &c.

Their power of visitation. To what it extends:

To corporations { Spiritual.
 { Lay.

When to hospitals.

When to universities, &c.

E C T.

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SECT. XI.

Concerning TEMPORAL magistrates.

THE temporal magistrates are of three kinds, viz.

Military,

Maritime.

Civil, or common-law magistrates.

The military were the constable and marshal, whose power, as far as the common law takes notice of it, consisted of two parts, viz.

Of a kind of MIXTUM IMPERIUM, which principally was for the preservation of peace, and ordering the army in time of war.

A jurisdiction belonging to their court martial : whereof before.

The maritime is the admiral, and those deriving power under him. Their power likewise consists of,

A kind of MIXTUM ET SUBORDINATUM IMPERIUM over the officers and seamen, especially in the king's fleets and yards.

POTESTATEM JURISDICTIONIS, in relation to matters arising upon the high sea.

And here of the admiral's jurisdiction, and the remedy if he exceeds in it;

By prohibition.

Action on the stat. 2 H. 4.

The common law, or civil magistrate ; I mean such as are instituted either by the common law, by statute, or by custom : these, in relation to things temporal, are various.

And because these magistrates consist not only of natural persons, as they are such, but of natural persons constituted

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stituted in some degree of empire, power, or jurisdiction; here will aptly fall in the diversity, the jurisdiction and powers of the several courts, and of the officers, both ministerial and judicial. These, though I shall not prosecute in all their branches and extents, yet I shall give some short account of them, viz.

The subordinate CIVIL magistrates are of two kinds :

Such as have not only a civil power, which I may call *POTESTATEM MIXTI IMPERII*, but also have a power of jurisdiction.

Such as have a kind of civil power, or *MIXTUM IMPERIUM*, but without jurisdiction. Vide sect. 12.

As to the former,

The persons that exercise this power, or jurisdiction, are called JUDGES, or judicial officers.

The places, or tribunals, wherein they exercise their power, are called COURTS.

And the right by which they exercise that power, is called JURISDICTION.

This therefore yields us these considerations.

The courts themselves, what they are, how they are constituted.

What their jurisdiction is, and the extent thereof.

Who the judges are, and how made, whether by commission, charter, prescription, custom, or by course of the common law.

The courts are of two kinds :

Courts of record.

Not of record.

First, of courts of record, there is this diversity, viz.

Supreme.

Superior,

Inferior.

The

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The supreme court of this kingdom is the HIGH COURT OF PARLIAMENT, consisting of the king, and both houses of parliament.

The courts I call SUPERIOR, are indeed of several ranks and degrees, and every one nevertheless is to keep within the bounds and confines of its jurisdiction by law assigned. And they are,

More principal.

Less principal.

The more principal are,

The court of the lords house in parliament,

The great courts at Westminster; as, {
Chancery,
King's Bench,
Common Pleas
Exchequer.

Justices itinerant (e) {
Ad communia placita,
Ad placita forestæ.

The LESS principal are such as are held,

By commission: {
Gaol-delivery,
Oyer and terminer,
Assize,
Nisi prius,
And divers others.

By custom, } As the courts {
or } of the counties {
charter: } palatine of {
Lancaster,
Chester,
Durham.

By virtue of act of parliament, and the king's commission: as the courts of {
Grand Sessions.
Sewers,
Justices of Peace,
And divers others.

INFERIOR courts of record. Though there be a subordination of most courts to some other, yet for distinc-

(e) See Blac. Com. 3 v. 57. 4 v. 411. 422.

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tion's sake I shall call those inferior courts which are ordinarily so called ; as,

Corporation courts.

Courts leet.

Sheriffs torns.

Secondly, courts NOT of
record are divers : as, { Courts baron,
County courts,
Hundred courts,
And others.

But I am not solicitous of pursuing this matter of courts and their jurisdiction over-largely ; because all the learning of them is already put together in the Tractates of Crompton, lord Coke, and others, who have written on the jurisdiction of courts.

S E C T. XII.

Of inferior magistrates, SINE JURISDICTIONE.

IT now follows, that somewhat be said of those magistrates who have a certain IMPERIUM, but without jurisdiction; and these are called ministerial officers.

Some officers indeed are simply MINISTERIAL, as clerks and officers in courts, *custos brevium*, prothonotaries, the remembrancers and chamberlains of the exchequer, &c.

But these, though they have a superintendency over their subordinate ministers, and a ministerial administration in courts of justice and elsewhere, I shall not meddle with in this place, but refer them to the several courts to which they belong.

For those that I here intend are of a more public and common kind, and are principally these, viz.

The sheriff of the county, who is THE GREATEST MINISTERIAL OFFICER; and I call him a magistrate, because he is A CONSERVATOR OF THE PEACE of the county, and executes the process of the king's courts.

Here are considerable,

How constituted :

How discharged :

What his power, his office, his duty.

This is a large subject : see those that have written of this office.

Mayors of corporations. And here of heads and governors of colleges, &c. (f).

(f) As to JUSTICES OF THE PEACE, see Blac. Com. 1 v. 350 to 365.

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Constables, and head constables.

These though they have not any jurisdiction to hold conuizance of any fact, yet are conservators of the peace, and have a kind of MIXTUM IMPERIUM relative to it.

Bailiffs of liberties, serjeants of the mace, and all that have a power vested in them by law for the EXECUTION of justice, are within the precincts and extents of their several offices A KIND of magistrates; for a subjection is by law required of others to them, in relation to that power wherewith they are invested, and the execution thereof.

Thus far of magistrates both supreme and subordinate, and the several rights that are INTUITU & SUB RATIONE OFFICII annexed to them.

[D 2]

S E C T.

S E C T. XIII.

Of the rights of the people or subject.

HAVING gone through the distribution of magistrates, I come now to the other term of relation, namely, of **SUBJECTS**.

And the **RIGHTS** of subjects are of these two kinds, viz.

Rights of DUTY, to be performed.

Rights of PRIVILEGE, to be enjoyed.

Asto the first of these, they are such duties as are to be paid or performed by them ; either,

To the king, as supreme executive magistrate : or,

To inferior or subordinate magistrates.

The rights or duties to be performed by the people to the king himself, are,

Reverence and honour, fidelity and subjection.

All which come under the name of **ALLEGIANCE** ; and the extent of this is declared, and assurance thereof given, by the oaths of allegiance, &c. of supremacy by 1 Eliz. of obedience by 3 Jac. 1.

Payments of those rights and dues, customs, subsidies, &c. which either by the common law or by act of parliament are settled on the king.

The rights to be performed to **INFERIOR** magistrates, are,

Reverence and respect to them, according to their place and authority.

A just subjection to their **LAWFUL** power and authority, as far as by law it extends.

The

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The rights and liberties to be enjoyed BY THE PEOPLE, both in relation to the king, and all his subordinate magistrates, are,

That they be PROTECTED by them, and treated according to the laws of the kingdom, in relation to,

Their lives,

Their liberties.

Their estates.

And here falls in all the learning upon the stat. of *magna charta*, and *charta de foresta*, which concerns THE LIBERTY OF THE SUBJECT; especially *magna charta*, cap. 29. and those other statutes that relate to the imprisonment of the subject without due process of law; as the learning of *habeas corpus*, and the returns thereupon;

Where the party is to be bailed.

Where to be remanded.

Where to be discharged.

Hither also refer those laws that relate to taxes and impositions; as,

The stat. *de tallagio non concedendo*.

The petition of right, &c.

² Inst. 59.

³ Car. 1.

Also, the statutes and laws concerning monopolies.

Commissions of martial law.

Commitments by the lords of the council.

And concerning the trial of mens lives, liberties, or estates, otherwise than according to the known laws of the land.

These, and many more of this nature, are common heads of those liberties and rights that the people are to enjoy under the magistrate.

And thus far concerning the CAPITA LEGIS, in reference to the political relation of the magistrate, both supreme and subordinate of the one part, and the SUBDITI or subject on the other part: for though subject, in a more

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strict and peculiar sense, is THE CORRELATIVE OF THE PRINCE; yet in a more large and comprehensive sense, it is a correlative to any inferior magistrate also, according to a more limited and restrained subjection.

S E C T. XIV.

Of the rights of persons under relations œconomical: and first, of husband and wife.

THUS far of the rights of persons under a political relation: now concerning the rights of persons under a relation OECONOMICAL.

And they are these;

Husband and wife.

Parent and child.

Master and servant.

And I shall here note once for all, that in œconomical relations, as in the former, I shall not only take in the persons themselves, but also those JURA RERUM which concern them under that relation; which though they may be of a distinct consideration under *jura rerum*, yet in this, and what follows, I shall, as before I have done, take in those *jura rerum* that have a kind of connection with the JURA PERSONARUM, under their several relations.

In the consideration of this relation of husband and wife, are these things considerable, viz.

In relation to the persons themselves.

In relation to certain connexes, consequences, or incidents, belonging to persons under this relation.

As

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As to the former, these CAPITA LEGIS and legal enquiries fall in, viz.

The persons that by law may intermarry, the limits whereof are prescribed by the statute 31 H. 8. restraining it to the degrees prohibited by the Levitical law.

And yet a marriage within those degrees is NOT void, but voidABLE by sentence of divorce.

The age of consent to the marriage:

In the male, fourteen.

In the female, twelve.

Note, the effects of marriages INFRA ANNOS NUBILES (g).

The differences of marriages; as,

A marriage *de facto*.

What is requisite to the constitution thereof;

And what effect it has.

And a marriage *de jure*,

What it is, and the effects:

And how each may be tried.

What dissolves the marriage.

And here of divorces, viz.

Co. on Lit.
235. a.

A *mensâ & thoro* only; as,

Causâ adulterii,

Causâ sævitæ.

A *vinculo matrimonii*; as,

Causâ consanguinitatis vel affinitatis.

Causâ præcontractûs.

Causâ frigiditatis.

(g) As to CLANDESTINE marriages, see 26 Geo. II. c. 33. and Blac. Com. 1 v. 439. 4 v. 162.—As to the marriage of lunatics, see 15 Geo. II. c. 30. And as to the marriages of the royal family, see Fortesc. Al. 401, 402. Lords' Journ. 28 Feb. 1772. and 12 Geo. III. c. 11.

[D 4]

And

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And here the effects of such divorce,

In relation } to the parties themselves.
 } to their children.

The second thing is, in relation to those incidents and consequences that arise upon the intermarriage, viz.

1 Rol. Abridge. 342. What things the husband acquires by the intermarriage, viz.

Personal things in possession.

Real chattels to dispose.

And here,

What shall be a possession.

What a disposition.

What things he acquires by the death of his wife;

In relation to chattels real :

By surviving her. Vide sect. 33.

In relation to inheritances ; as,

Tenant by the curtesy, if he have issue inheritable by her.

Bacon's Here of tenants by curtesy.

Hist. 105. What things he acquires NOT by the intermarriage, or death.

Note, personal things in action, are in him to discharge by the marriage ; but not to enjoy them by marriage ; or death, unless he be her executor or administrator.

What acts of the husband during the marriage bind the wife.

And here of discontinuances.

What acts of the wife during coverture bind the husband, and what not.

And here of

Her contracts,

Her wills,

Her receipts.

What

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What acts bind herself, and what not.

And here of fines by judgment against her.

What the wife acquires by the marriage or death of the husband ;

In relation to honorary titles and precedence.

In relation to inheritances.

And here of dower, the kinds of it,

When and how due.

Also of quarantine.

In relation to chattels.

Here *de rationabili parte bonorum* ;

And *bona paraphernalia*.

Remedies by the wife against the husband,

In casu sevitiae.

In casu alimoniae.

Either in the spiritual court :

Or temporal.

In what actions they must sever.

In what they may join or sever.

What relation of proximity either has to the other in case of survivorship, as to the administration of each other's goods.

S E C T. XV.

Concerning the relation of parent and child.

I COME now to the second æconomical relation, i. e. father, or mother, and children; and therein we are to consider,

The father's interest in the child :

In his custody or wardship.

In the value of his marriage.

In his disposal.

The father has the disposal,

Of his child's education.

Of his custody to another.

Vide the act, how far the mother, surviving the father, is interested in those rights.

1 Sid. The child's interest in the father or mother,

113. To be maintained by him in case of impotency, by stat. 43 Eliz. c. 2.

The RECIPROCAL interest of each :

Whereby they may,

Maintain each other's suits.

Justify the defence of each other's persons.

1 Sid. 114, Here enquire how far forth the GRANDCHILD, after

115. the death of the father, is a child within these considerations.

S E C T. XVI.

Of the relation of master and servant.

TOUCHING the third œconomical relation, of master and servant, little is to be said,

But here consider,

The kinds of servants,

The nature of retainers,

The acts that may be done **RECIPROCALLY** by the master, or servant, to each other ;

In maintaining their suits ;

In defending their persons.

SECT. XVII.

Concerning relations civil.

I HAVE done with relations political, and also economical, and therefore come now to those which I call CIVIL; though it is true, that term, in a general acceptation, is also applicable to the two former relations.

But in a LIMITED and LEGAL sense, I distinguish civil relations into four kinds, viz,

Ancestor and heir.

Lord and tenant.

Guardian and pupil.

Lord and villein.

S E C T. XVIII.

Concerning ancestor and heir.

THIS relation I made distinct from that of parent and child, because many persons are ancestors, as to the transmission of hereditary successions, that are not parents; and many inherit as heirs that are not children to those from whom they inherit. And although the business of hereditary successions will fall in hereafter, when we come to speak of the JURA RERUM, and the manner of transferring of properties, yet I shall mention it here also. And first, consider, Who cannot be ancestor or heir.

A bastard MAY be ANCESTOR in relation to his own children, or their descendants, but not to any else.

But a bastard cannot be HEIR.

Add here, of bastards ;

Who a bastard by the laws of England ;

By what name he may take : by purchase, &c.

In a right ASCENDING line, the son is NOT an ancestor TO TRANSMIT to his father, or grandfather, by hereditary succession.

The HALF-blood is an impediment of descent, viz.

Of lands;

NOT of dignities.

Who may be ancestor or heir.

Inf. Sect.

And here all the rules of hereditary successions

30. 33-

may come in: whether,

In LINEA DESCENDENTE, from father to son or nephew ;

In LINEA ASCENDENTE, from nephew to uncle ;

In LINEA TRANSVERSALI, from brother to brother.

S E C T.

S E C T. XIX.

Concerning lord and tenant.

UNDER the relation between lord and tenant, these titles fall, viz.

First, the tenure itself:

What it is;

How created:

What the fruits thereof

Inf. Sect. 24. Rent, { Service.
Charge.
Seck.

Services of two kinds:

Of common right incident to tenures; as,

Fealty:

What it is.

Conventional services; as,

Homage,

Knights service,

Grand or petit serjeanty.

Secondly, certain perquisites arising from it; as,

Wardship;

Marriage;

Escuage;

Relief:

And also escheat, which is either,

Postea, EX DEFECTU SANGUINIS, for want of heirs:
Sect. 33. or,

EX DELICTO TENENTIS, as by attainder.

And these several titles may be branched into exceeding many particulars.

S E C T.

S E C T. XX.

Concerning guardian and pupil.

THE third sort of civil relations are pupil and guardian.
And herein are considerable,

With respect to the guardian, what and 3 Co. 37. b.
how many sorts of CUSTODIES there are: as,

Guardian BY NATURE,—the father;

And in some re- { The mother.
spects, { The grandfather.

Quære, in what cases, and to what intents.

Guardian BY NURTURE.

Guardian BY SOCAGE;

Who shall be;

For how long time.

Guardian by knights service.

Vide sect. prox' supra.

With respect to the pupil or heir, is considerable;

When he shall be said to be of FULL age

By common law:

By custom.

What he is enabled or disabled to do:

In relation to lands.

In relation to goods or contracts.

And here,

Where he shall be bound;

Where not.

These may come in here, but more properly before,
under capacity, sect. 1.

SECT. XXI.

Of lord and villedin.

THIS title is at this day of LITTLE use, and in effect is altogether antiquated; and therefore I refer myself herein wholly to Littleton.

SECT. XXII.

Concerning persons or bodies politic, i. e. CORPORATIONS.

I HAVE done with the JURA PERSONARUM NATURALIUM, considered under their several relations, political, oeconomical, and civil; and therefore I now come to persons politic, or corporations, that is, bodies created by OPERATION OF LAW.

The highest and noblest body politic, is THE KING; who though he be a body natural, yet to many purposes is also a body politic or corporate, as has been already shewn, and shall not now resume. Therefore bodies corporate, in respect of the nature of them, I divide into two kinds, viz.

Ecclesiastical.

Temporal.

Ecclesiastical corporations are distinguished in their constitution, thus; viz.

In the title of it.

In the manner of it.

In the nature of it.

In

THE ANALYSIS OF THE LAW. [49]

In the **TITLE** of their constitution, they are,

By prescription;

By charter; as all **NEW** ecclesiastical corporations,
founded **WITHIN** memory, are.

In the **MANNER** of their constitution, they are,

Elective.

Presentative.

Donative.

And here,

Of institution.

Induction.

By whom to be made;

And when;

And the effects thereof.

Also of lapse,

And devolution;

When, and how.

In the **NATURE** of their constitution, they undergo many
diversifications, and are,

With cure, as parson, vicar, &c.

Without cure, as prebend.

Regular, as abbot, prior.

Secular, as master of hospital, parson, vicar, &c.

With dignity, as bishops, deans, chancellors; or,

Without dignity, or simple benefices, as parson, vicar,
prebend.

Sole, as bishop, dean, parson, vicar, prebend; or,

Aggregate, as dean and chapter, master and confraternity.

And under every of these distinctions, the following con-
nexes fall in, and are considerable, viz.

How they may **ACQUIRE**;

And what is requisite thereto.

By charter or deed.

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By licence to purchase in mortmain.

And here of MORTMAIN, which is equally applicable to all sorts of corporations, whether ecclesiastical or secular.

How they may ALIEN.

Here fall in the several disabling statutes of 1st, 13th, and 18th of Eliz. and the enabling statute 32 H. 8. &c. and what circumstances and qualifications are requisite to enable such alienations: and if by demise, or otherwise.

How they are DISSOLVED, and the effect of such dissolutions; as,

What becomes of

Their lands;

Their goods.

And this is likewise applicable to

Lay corporations.

Now as to temporal or lay corporations,

They are of two kinds:

SPECIAL corporations, i. e. erected to some special purposes, as where the grant is to a monk, or to the good men of Islington in fee-farm.

So CHURCH-WARDENS are, by the common law, a special corporation to take goods or personal things to the use of the parish.

GENERAL corporations; which are distinguished thus:

In respect to the TITLE of their corporation,

By charter:

By prescription.

In respect of their QUALITY or condition, they are

SOLE; as the chamberlain of London, as to bonds taken by him for the use of orphans, is a sole corporation.

AGGREGATE, as mayor and commonalty,

master

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master and scholar, master and confreres of an hospital, &c.

And here,

The manner of their visitation :

And by whom.

In respect of the RULES of their constitution,
where the members are,

Elective.

Donative.

And as common incidents to corporations are considerable;

How they are dissolvable.

By QUO WARRANTO.

The effect of such dissolution.

How the particular members are removeable.

Their remedy, if wrongfully removed,

By MANDAMUS.

And here comes in the learning of writs of restitution in
the king's bench, of persons unduly disfranchised.

Hitherto of the distribution of the heads and branches of
the law touching the *jura personarum*, or rights of persons.

S E C T. XXIII.

Concerning the JURA RERUM, and the general division thereof.

HAVING done with the rights of persons, I now come to the rights of things. And though according to the usual method of civilians, and our ancient common law treatises, this comes in the second place after the *jura personarum*, and therefore I have herein pursued the same course, yet that must NOT be the method of a young student of the common law, but he must begin his study HERE,—at the JURA RERUM; for the former part contains matter proper for the study of one that is well acquainted with those *jura rerum*.

And although the connexion of things to persons has in the former part of these distributions given occasion to mention many of those *jura rerum*, as particularly annexed to the consideration of persons under their several relations; yet I must again resume many of them, or at least refer unto them; and this without any just blame of tautology; because there they are considered only as INCIDENTAL and relatively; but HERE they are considered ABSOLUTELY—in their own nature or kind,—and with relation to themselves, or their own nature,—and the several interests in them, and transactions of them.

And in this business I shall proceed in the method following, viz.

I shall consider the THINGS themselves, about which the *jura rerum* are conversant, and give their general distributions.

I shall consider the several RIGHTS in those things, or to them belonging; and the manner of the production, creation, and translation of those rights.

I shall

I shall consider the wrongs, injuries, or causes of action, arising by wrongs or injuries DONE TO those rights.

I shall consider the several REMEDIES that relate either to the retaining or recovering of those rights.

First, therefore, I proceed to the consideration of the things themselves, and their distributions. Bracton (and others) following the civil law, in his second book, cap. II. DE RE-RUM DIVISIONE, makes many distributions of things; but I shall only use such a distribution, as may be comprehensive enough to take in the general kinds of things, whereof the law of England takes notice; without confining myself to the distributions of others, but where I find it necessary for my purpose,

Things therefore in general may be thus distributed, viz.

Some things are temporal or lay.

Some things are ecclesiastical or spiritual.

Those things that are temporal or lay, are of two kinds;

Some are JURIS PUBLICI.

Some are JURIS PRIVATI.

Those things that are JURIS PUBLICI, are such as, at least in their own use, are COMMON TO ALL the king's subjects; and are of these kinds, viz.

Common highways.

Common bridges.

Common rivers.

Common ports, or places for arrival of ships.

And this lets in the various learning touching those things.

As for instance :

Who are to repair highways or bridges,

By tenure.

By custom, or of common right,

Also concerning nuisances in them.

And in common rivers or ports,

And how to be remedied.

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[But this we shall meet with when we come to Pleas
of the Crown.]

Those things that are JURIS PRIVATI, are of two kinds;

Things personal.

Things real.

Things personal are again of two kinds:

Things in POSSESSION.

Things in ACTION.

Things personal in possession; as,

Money, jewels, plate, household-stuff, cattle of all sorts,
emblems, &c.

Things in action are RIGHTS of personal things, which
nevertheless are NOT in possession; as,

Debts DUE, either,

By contract;

By specialty; as,

By deed or obligation, or

By recognizance.

Goods whereof the party is DEVESTED, or out of
possession.

RIGHTS of damages UNCERTAIN; as

Covenants broken.

Legacies not paid or delivered.

Personal things in CONTINGENCY; as,

Accounts, and many more.

Also annuities which are partly in possession, for that
they are grantable over; and partly in action, be-
cause not recoverable but by action.

S E C T. XXIV.

Concerning things REAL, and their distribution.

THINGS real are of two kinds:

Corporeal,

Incorporeal.

Corporeal things are such as are MANURABLE (*b*).

And they again are of two kinds;

SIMPLE.

AGGREGATE.

Things corporeal which are simple, are generally comprehended under the name of LANDS; which yet are distributed into several kinds, according to their several qualifications, and accordingly are demandable IN WRITS; as,

A messuage, a cottage, a mill, a toft, a garden, an orchard, arable land, meadow, pasture, wood, marsh, moor, furze and heath, and divers other appellations.

And here the learning comes in touching the NAMES of things, by which they either,

PASS in assurances; or,

ARE DEMANDABLE by writs, &c.

Things corporeal aggregate, are such as consist of things of SEVERAL NATURES, whether they be all corporeal, or the principal part corporeal, but the other part INCORPOREAL; because that part which is corporeal in them, gives it the denomination of corporeal; and they pass WITHOUT deed for the most part, as things corporeal do, and are of several kinds, viz.

Honours, consisting of many manors.

(*b*) THINGS capable of cultivation. Vide Hale's Origin of Mankind.

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Manors, consisting of,

Things corporeal, as demesnes ;

Things incorporeal, as reversions, services.

And here of manors, how created :

And the incidents to them ; as,

Court-baron.

Also of the distribution of them into,

Manors IN RIGHT, where there are demesnes and freeholders.

Manors IN REPUTATION ; as conventional or customary manors, consisting of copyholders only.

Rectories, consisting of glebe and tithes.

And although rectories PRESENTATIVE may seem more properly to come under things ecclesiastical ; yet since at this day many rectories and tithes are also become LAY fees, I bring them in under this distribution.

Vills, hamlets, granges, farms, &c. are a kind of corporeal things aggregate ; for they consist of houses, lands, meadows, pastures, woods, &c.

And here comes in,

Parcel, or nient parcel.

What parcel in right.

What parcel in reputation.

And the effects thereof in point of conveyance.

All the learning of incidents, appendants, appurtenances, &c. as,

What may be appendant, appurtenant, regardant.

How and where they pass by GENERAL words, without naming them.

Things incorporeal are of A LARGE EXTENT, but may be reducible unto these two general kinds, viz.

Things incorporeal, NOT IN THEIR OWN NATURE, but so called in respect of the degree or circumstance wherein they stand ; as,

Reversions.

Remainders

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Remainders.

The estate of lands.

Here of reversions and remainders; what they are, how transferred.

By deed.

By livery without deed.

Also how a reversion may pass by the name of lands, or by the name of a remainder, or *à converso*.

Things incorporeal IN THEIR OWN NATURE: and these are of very great variety, and hardly reducible into general distributions, and therefore I am forced to take them by tale, viz.

RENTS, reserved, or granted; as rent-service, rent-charge, rent-seck.

And here of rents; the several kinds of them; how created, how transferred, viz. by deed. How apportioned, how extinguished; what the ordinary remedy to recover it, viz. DISTRESS.

But of distresses, see hereafter in remedies.

Services PERSONAL incident to tenures; as, homage fealty, and knights service; what services are entire, what severable.

ADVOWSONS of all sorts;

Donative:

Presentative.

And here of right of patronage, right of foundryship; how raised; how transferred; what incidents to it.

TITHES of all sorts,

Personal;

Prædial;

And mix'd.

And here again of tithes, their kinds, their discharges, &c. may be referred hither, and that more properly than before.

COMMONS

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COMMONS of all sorts ; as common of estovers, and of pasture, appendant and appurtenant ; for cattle sans number, *separabilis pascuura* ; and what may be done by those commoners,

In relation to OTHER commoners by ADMEASUREMENT.

In relation to the lord by distress or action.

And all the learning hereof may be added here, though we shall meet with it again hereafter.

All kinds of PROFICUA CAPIENDA IN ALIENO SOLO ; as herbage, pawnage, &c.

All kinds of pensions, proxies, (procurations) &c.

OFFICES of all sorts.

And here of offices, their distribution, what may be incident or appurtenant to them.

FRANCHISES and LIBERTIES of all sorts, many of which have been before mentioned, and may be transferred hither.

And here I shall again shortly distribute them into these two kinds, viz.

Such as are flowers of the crown and part of the king's royal revenue, as waifs, strays, felons, goods, goods of persons outlawed, prize, wreck, treasure trove, royal fish, royal forfeitures, fines, issues, amerciaments, forests, &c.

Wide
& s.

Such as are NOT parcel of the king's royal revenue, but either lodged in him, or created by him ; as counties palatine, markets, fairs, tolls, courts leet, hundred courts, liberty to hold pleas, returns of writs, bailiwicks of liberties, warrens, ferries, and the like.

And every one of these yield a large field of learning, viz.

How

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How they may be created or acquired.

What are acquired by prescription or custom.

What in point of charter.

Where one liberty may be granted to the prejudice of another, or not.

How these several liberties are to be USED ; what their nature, &c.

How they may be lost, either by nonuser, misuser, or nonclaim in eyre.

And therefore, though I have mentioned these liberties and franchises before, in relation to the king's VOLUNTARY JURISDICTION in creating them, yet the full discussion and learning of every of them may be hither referred.

VILLEINS: and here that learning may come in. Vide ante, Sect. 21.

DIGNITIES ; as dukes, marquesses, earls, viscounts, barons, &c.

And thus far touching incorporeal real things TEMPORAL.

Their common incident is, that they pass NOT from one to another WITHOUT deed. And to these several titles, may be reduced all the learning of each particular.

SECT.

S E C T. XXV.

Concerning things ecclesiastical or spiritual.

I HAVE done with things temporal, and come to those that are ECCLESIASTICAL or spiritual. And though the possessions of ecclesiastical persons, the offices, courts, and jurisdictions ecclesiastical, and tithes also, might come in under this general head, yet because these things fall in the former title under temporal things, and for that the rule for them both is the same, I shall not need to repeat it here; only I will remove what before came under the title Corporations, because it may be thought to come in more conveniently in this place.

Ecclesiastical things are of two kinds, viz.

Such as are ecclesiastical or spiritual in their USE.

Such as are so in their NATURE.

Of the former sort, are,

Churches,

Chapels,

Church-yards, &c.

(Which lets in the learning touching repairs.)

And these are of two kinds.

Parochial.

The bounds of parishes;

Relief of the poor;

And other parochial charges.

And

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And these are either,

In right.

In representation.

Not parochial; as,

Chapels of EASE:

Such as are ecclesiastical in their NATURE, are either,

Dignities, or,

Benefices.

Ecclesiastical DIGNITIES are of two kinds, viz.

SUPERIOR; as,

Archbishopsricks,

Bishopsricks.

INFERIOR; as dignities in cathedral churches, as,

Dean,

Chancellor,

Præcentor.

Ecclesiastical benefices are likewise of two kinds:

WITH CURE; as,

Parsonages,

Vicarages, &c.

WITHOUT CURE; as,

Prebends,

Ecclesiastical hospitals, &c.

And here the learning touching those matters, and also touching vacancy by pluralities.

Also of appropriations, common dispensations, qualifications:

And vacancy, by

Resignation,

Deprivation,

Cession.

So much touching ecclesiastical benefices not observable supra, Sect. 22.

SECT.

S E C T. XXVI.

Of the nature and kinds of PROPERTIES.

HITHERTO of the kinds of things ; I come now to consider the nature and kinds of those PROPERTIES or INTERESTS that persons have, or may have in them.

The rights of things are distributed according to the nature of the things themselves ; which are,

Personal.

Real.

The RIGHT of things personal is called PROPRIETY, and under that will come these considerables, viz.

The KINDS of those rights ;

The CAPACITIES wherein they are held ;

The MANNER of their being acquired or transferred.

The kinds of those rights or proprieties of things are three, viz.

A propriety of ACTION, which is relative to all things IN ACTION.

A propriety in POSSESSION.

A MIXED propriety, partly in action, and partly in possession.

Touching the property of things in action.

This is an INTEREST by SUIT or order of law, TO DEMAND the things themselves, or damages for them.

But of this hereafter, when we come to wrongs or injuries.

Touching

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Touching property in possession, it is either,

Simple or absolute ;

Special or particular.

Simple or absolute property, is when a man HAS IT, and no other has or can have it from him, or WITH him, but by his own act or default.

The special or PARTICULAR property is of two kinds, viz.

Such as some OTHER has a CONCURRING interest with him therein.

Such wherein, though no other has any concurring interest with him, yet his property is but TEMPORARY, and vanishes by certain accidents or occurrences.

The former kind of these special or particular properties are very various, viz.

The interest that a man has by BAILMENT.

The interest he has in goods PLEDGED: or,

The interest he has in goods CONDITIONALLY granted.

The interest he has in things DISTRAINED, or, a distress.

The interest of goods demised for a TERM.

The second kind of special property, wherein though no OTHER has a property, nor indeed are things in themselves capable of any CERTAIN or SURE property, yet a man by certain contingents or accidents may have a TEMPORARY property in them ; such are things FERÆ NATURÆ ; wherein a temporary property may be lodged upon these grounds, viz.

RATIONE IMPOTENTIÆ ; as in YOUNG birds in a nest upon MY tree.

RATIONE LOCI ; as conies and hares while in MY ground.

RATIONE

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RATIONE PRIVILEGII; as of birds or beasts of warren while within MY warren, and swans within MY liberty.

Touching mixed properties, i. e. partly in action, and partly in possession: They are ANNUITIES; wherein a man may have a personal inheritance.

Thus far of property or right in things personal.

The second thing propounded; is THE CAPACITY wherein a man may have them; and that is double:

IN JURE PROPRIO.

IN JURE ALTERIUS.

And this latter is of two kinds;

As a body politic.

As executor in right of the testator. *

The third thing propounded is, the MANNER of the acquist, or translation of property. And because both of these will be much of one consideration, I shall join them in the course of my distributions.

Personal things, either in action or possession, may be acquired or transferred three ways:

By act in law.

By act of the party.

By a mixed act, consisting of both

SECT.

S E C T. XXVII.

Of acquisition of property by act IN LAW.

THIS acquisition by act IN LAW may be many ways,
viz.

By SUCCESSION, whereby properties are transferred to the successors of such a corporation by law or custom, which has a power to receive personal things in a politic capacity; as,

A sole corporation by CUSTOM:

An aggregate corporation, by COMMON LAW,

By DEVOLUTION, viz.

To the executor.

To the ordinary.

To the administrator,

To the husband by the intermarriage, i. e. as to personal things IN POSSESSION, but NOT as to personal things IN ACTION.

By PREROGATIVE; whereby they are given to the king, or to such as have the king's title, by grant or prescription; as waif, stray, wreck, treasure trove.

By CUSTOM; as in the case of heriot custom, and heriot service, mortuaries, heir looms, foreign attachment, affignment of bills of exchange.

By JUDGMENT, and EXECUTION thereupon; which in the case of the king extends as well to things in

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action that have a certainty in them (as debts) as to things in possession. But in the case of a common person, ONLY as to things in possession.

And this by,

1 FIERI FACIAS: or,

Devent 16. ELEGIT.

By SALE in market-overt.

SECT.

S E C T. XXVIII,

Acquisition of property by act of the party, and mixed act,

ACQUISITION of property BY ACT OF THE PARTY,
may be three ways, viz.

By grant.

By contract.

By assignment.

And herein is considerable,

That in THE KING's case it extends as well to things
in action as in possession ; for DEBTS may be assigned
TO HIM, OR BY HIM.

In the case of other persons, only things in POSSESSION
are assignable.

Acquisition thereof by a mixed act, partly by act of law,
and partly of the party.

And thus things in action, as well as in possession, are
transferrable two ways.

By act of the party, with CUSTOM CO-OPERATING.

Thus a bill of exchange is assignable.

By operation of the law, concurring with the act or
default of the party ; as, FORFEITURES of several
kinds, viz.

By outlawry in a personal action.

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By being put in *exigend* in the case of felony.

By attainder of treason or felony.

By motion to the death of any person ; as deodand,
And thus far concerning the rights of things personal.

SECT. XXIX.

Concerning the rights of things REAL.

I NOW come to the rights of things real ; and herein I shall hold this method.

I shall consider the rights of the things themselves, or the various interests and estates in things real, viz.

The different NATURE of estates or interests in things real, in relation to,

Their nature and extent ;

Their limitation or qualification.

The different RELATION of those estates, with respect to the POSSESSION.

Vide Sect. 32. The different QUALITIES thereof in respect of the persons having the same.

As to the difference of estates, with relation to their nature and extent, they will be divided into,

Estates

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Estates by the course of the common law;

Estates by custom, or COPYHOLDS.

Estates by course of the common law are divided into, Pref.
Co. Lit.

Estates of inheritance;

Estates less than inheritance.

Estates of inheritance are,

FEE-SIMPLE.

FEE-TAIL.

SECT. XXX.

Of estates in fee-simple and fee-tail.

OF an estate in fee-simple; wherein is considerable,
The extent and nature of the estate;
The quality incident thereunto.

As to the extent and nature of the estate:

It is an estate **TO A MAN AND HIS HEIRS FOR EVER.**

And a fee-simple is either,

Co. Lit. Absolute;

18. Limited or qualified.

An absolute fee-simple is such as has no bounds or limits annexed to it, and is an estate to a man and his heirs **ABSOLUTELY** for ever.

A limited or qualified fee-simple is such as has some collateral matter annexed to it, whereby it is made by some means determinable; viz.

By limitation; or,

By condition.

The **QUALITY** of an estate in fee-simple is, that it is transmissible in the very nature of the estate;

To the **SUCCESSOR** in bodies corporate by a right of succession;

To the **HEIR** in the case of persons **NATURAL** by descent.

To any other person by **ALIENATION**.

As to the former of these,

The nature of the corporation directs the rule of succession.

As to the second;

The rules of descents are directed,

By

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By custom.

Inf. Sect.

By common law.

33.

By custom; as;

To ALL the sons in GAVELKIND.

Bacon's

To the YOUNGEST in BOROUGH ENGLISH.

Hist. part

2. p. 106.

By the common law, wherein the rules of the common law give the direction.

But of this more at large in Sect. 33.

The second estate of inheritance is **FREE-TAIL**.

And herein are likewise observable,

The nature and extent of the estate;

The incidental qualities thereof.

As to the first of these,

The manner of its limitation is that which **DEFINES AND CIRCUMSCRIBES IT**: and that is either,

GENERAL; when an estate is given to one, Co. Lk.

and the heirs of **HIS BODY**; the heirs Sect. 13.

MALE of his body, or the heirs **FEMALE** of his body.

SPECIAL; as when it is limited to a man, and the heirs of his body **BY SUCH A WOMAN**; or *converso*.

And here falls in a consequent of such a limitation namely,

An estate tail **AFTER POSSIBILITY** of Sect. 31.

issue extinct.

As to the incidental qualities, or qualities incident to such an estate, they are;

In relation to the hereditary transmission thereof;

In relation to the alienation thereof.

In relation to the hereditary transmission thereof, Inf. Sect.

the rules of descent **DIRECT** the manner of it. 33.

In relation to the alienation thereof. Regularly by the

stat. **DE DONIS CONDITIONALIBUS** they have no power of aliening, so as to bar the issue, reversion, or remainder.

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And therein are considerable,

What alienations are void by his death, either,

By the stat. *de donis conditionalibus*.

By the stat. 11 H. 7. of jointresses.

What alienations are voidable only, viz.

By entry.

By action.

By suit.

And therein of discontinuances.

What alienations bind the issue in tail, but NOT the reversioner, viz.

Co. Lit. 372. A fine with proclamations, by stat. 4 Hen. 7.

A lease for three lives, &c. and accustomable rent,
by stat. 32 H. 8.

Attainder of treason, by stat. 33 H. 8.

Co. Lit. 374. A warranty collateral, lineal, with affets.

What alienations bind both the issue and the reversioner, viz.

Co. Lit. A COMMON RECOVERY pursuant to law.

372. b. And here of common recoveries;

Their kinds:

Their effects.

SECT.

SECT. XXXI.

Of estates at common law, LESS than inheritance.

THE said estates are considerable likewise:

In their nature and kinds:

In their incidents.

In their nature and kinds, they are either,

Estates of freehold.

Estates LESS than freehold.

Estates of FREEHOLD are again divided into,

Such as arise by act of law;

Such as arise by act of the party.

Freehold estates arising by act of law are,

Tenant by the curtesy of England;

Tenant in dower.

Sect. 14.

And here of the learning of both these.

Freehold estates arising by act of the party are,

Tenant for his OWN LIFE: which is either,

Simply so; or,

With a privilege annexed; as,

Tenant after possibility, *de quo sup.*

Tenant PUR AUTER VIE.

And herein of occupancy,

General.

Special.

As also of estates limited to one and his heirs, PUR

AUTER VIE.

Estates LESS than freehold are of two kinds:

Certain.

Uncertain.

Estates

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Estates less than freehold CERTAIN, are leases for years.

And here also of leases by stat. merchant, stat. staple; and *elegit*.

And likewise the learning of extents, re-extents; *audita querela*, &c.

INCERTAIN estates less than freehold are;

Tenants AT WILL (i).

These are determinable at the will of either party.

The incidents to all these particular estates, EXCEPT TENANCY AT WILL, are these, viz.

They are transferrable from one to another, unless particularly RESTRAINED;

By condition; or

By limitation.

They are forfeitable;

And here of the various forfeitures of particular estates; as,

Such as give a right or title of entry to him in reversion.

Such as give a remedy by action; as, waste.

Inf. Sect. And here of the title waste.

(i) But see Blac. Com. 2 v. c. 143 to 146

S E C T. XXXII.

Of the distinction of RIGHTS of estates, with relation to the POSSESSION.

HAVING gone through the several kinds and Vide § 29.
natures of estates both at common law and by
custom, I come now in the second place to the various rela-
tions that these estates have **TO THE POSSESSION**; which
gives several other determinations unto the rights that persons
have to them.

These estates before mentioned, and the rights thereupon,
are either,

Such as are **IN possession**;

Such as are **NOT in possession**.

The right of estates **in possession**, is where there does not
interpose any estate or interest between the right and the
possession of the thing; as,

Tenant for life **IN POSSESSION**;

Tenant in fee **IN POSSESSION**, &c.

The rights that are **NOT immediately in possession**, are,
either,

Where the time of their enjoyment **EXPECTS** the
accomplishment of something else, that **MUST AN-**
TECEDE it.

Where the **RIGHT** or estate perchance is immediately
IN the party; **but** the possession thereof is removed
or detained by another.

As to the former of these, they are of several kinds, viz.

REVERSIONS; which though a present interest, yet stands
in

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in a degree removed from the possession till the particular estate be determined.

REMAINDERS.

FUTURE INTERESTS of terms for years.

CONTINGENT interests; or interests of estates limited to take place upon a precedent condition.

This is frequent in cases;

Of accrewers.

Of contingent uses.

ESTATES subject to a condition of re-entry; wherein he that has the benefit of the condition, though he has an estate in the condition, yet he has not the land till the condition broken; **AND** a re-entry.

Where the estate is devested, or removed, or detained, by another;

This gives two new and additional denominations, viz.

A **TITLE** of an estate:

A **RIGHT** of an estate.

A title of an estate, is where a man has not yet the possession; but has a title to have it, by reason,

Of a condition broken;

3 Eliz. Of a title of entry given by forfeiture:

c. 20. Of a title of entry by reason of acts of parliament.—

As title of entry for mortmain:

For assent to a ravisher, &c.

A **RIGHT** of an estate, is where a man is put out of his estate by the wrong of another.

Hereby, though he has still the right to have the estate he had before, yet he has not the estate itself in possession.

And those rights are of two kinds,

Remediable;

And

Remediless.

REMEDIALE

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REMEDIAL RIGHTS are of two kinds: viz. they are remediable, either,

By entry, which is called a right of entry;

By action, which is called a right of action.

And these are,

In case of usurpation of advowson.

In case of a discontinuance by tenant in tail, &c.

In case of a disseisin or abatement, and a dying seised by such disseisor or abator, and a descent to his heir.

And here all the learning of

Entries congeable;

Discents *que toll entry*;

Continual claim;

Infants, when bound, &c.

REMEDIABLE RIGHTS are where the remedy is taken away, though THE RIGHT REMAINS;

Which may be either,

By warranty, collateral or lineal, with affets. *Supra,*

And here comes in the learning of bars *Sect. 30.*

and rebutters by warranty.

By nonclaim upon a fine.

By limitation of time. By the old, or the later statutes, introduced in such cases, viz. 32 H. 8. 21 Jac. 1.

The third thing I propounded, was the different qualities and relations in regard of the persons *Vide § 29.* having the estate.

And these are,

SOLE TENANTS.

JOINTENANTS.

TENANTS IN COMMON.

And here comes in the learning of each of these.

S E C T. XXXIII.

Touching acquisition and translation of estates in things real.
First, BY ACT IN LAW.

THUS far have I gone in a description of the various natures, relations, and kinds of estates; and now I come to the manner or MEANS of their acquett or translation.

And an estate or interest is thus translated, viz.

By act of law;

By means of the party. Vide prox^t Sect.

By act of law, there is a various acquisition of things, according to their several natures, viz,

Of things real that are CHATTELS.

Of things real that are FREEHOLDS.

Of things real that are INHERITANCE.

As to the acquett of CHATTELS by act of law; though they are real, they are of the same kinds as things personal, therefore vide ante Sect. 27.

[Only with this additional exception, that chattels real go not to the husband immediately by the marriage, UNLESS HE SURVIVES THE WIFE.]

As to the acquett of estates of FREEHOLD by act in law, there is only the title Occupancy which here comes in;

And that is either $\left\{ \begin{array}{l} \text{General,} \\ \text{Special.} \end{array} \right.$

As

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As to matters of INHERITANCE, the titles of acquests therein by law, seem to be of two kinds, viz.

Such as is applicable to all estates of inheritance, viz.
DESCENT.

Such as is applicable only to the acquest of estates in
FEE-SIMPLE.

The act in law applicable to the acquest of all estates of inheritance,—descent, or hereditary succession, is either

Of an estate-tail : or,

Of an estate in fee-simple. *

Touching the descent of estates-tail, **THE MANNER OF THE LIMITATION DIRECTS THE DESCENT** as aforesaid.

Touching the descent of fee-simple, two things are considerable, viz.

The rules of the descent itself.

The burden or charges that lie upon the heir that takes by descent.

The rules of descents of fee-simple are directed, either,

By custom ; or,

By common law.

The direction of descents by custom is various ; as,

Sometimes to **ALL** the sons, as **GAVELKIND** :

Sometimes to the **YOUNGEST** son, as **BOROUGH ENGLISH**.

Sometimes to the eldest daughter, or youngest, &c. as some customary lands.

The direction of descents by the common law, and the rules thereof, are divers, viz. §. 18.

Relating to the **QUALITY** of the persons in the line,
ASCENDING,
DESCENDING,
And TRANSVERSAL.

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In relation to the number of persons inheriting, viz,
ONE, if it be a MALE, is heir.

ALL, if they are FEMALES.

And here the learning of parceners and partition.

In relation to the IMPEDIMENTS of the descent ;
as,

ILLEGITIMATION,

HALF-BLOOD.

ATTAINDER,

OR CORRUPTION OF BLOOD.

The burden upon the heir : how and where charge-
able ;

With the debt or covenant of the ancestor :

With the warranty of the ancestor.

The second kind of means of acquisition by act in law,
refers only to estates in fee-simple ; as,

First, by prescription or custom ; which is,

Of things IN GROSS and SUBSTANTIVE :

And thus a right of an incorporeal inheritance is
gainable.

Of things incident and appurtenant,

And here of prescription or custom ; the nature,
kinds, and effects thereof.

Ante, Secondly, by ESCHEAT ; which is either,

For default of heir.

For attainder of the tenant, viz.

For felony,—to the lord.

For treason,—to the king.

S E C T. XXXIV.

Concerning acquests by the means of the party. And first, by
RECORD.

AQUESTS of estates, by the means of the party himself, may be of two kinds, viz.

By wrong ;

By right or title.

Acquisitions BY WRONG are also of two kinds, viz..

By wrong to a chattel ; as,

Ejectment of farm.

Ejectment of *gard*.

By wrong to a freehold ; as,

Abatement ;

Disseisin ;

Intrusion ;

Usurpation.

Acquisition by right or title, is likewise of two kinds ;

By CONVEYANCE :

By FORFEITURE.

Acquisition by conveyance. Here may be brought in all the methods and courses of assurances and conveyances of lands, which lets in the most ample and considerable part of the law.

Conveyances therefore are of two kinds :

By matter OF RECORD.

By matter IN PAIS.

By matter of record, they are either,

By fine.

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By common recovery.

By deed enrolled.

By FINE ; where comes in all that learning, viz.

Their kinds ;

Their effects.

Their kinds are in general two, viz.

Fines at Common law.

Fines with proclamations.

And here of their kinds in special.

Their effects ;

In relation to bar privies, or conveyance of estates.

In relation to strangers, non-claim.

As to COMMON RECOVERIES, therein are considerable ;

Their kinds, with treble, double, or single voucher.

Their effects ;

In relation to transferring or barring estates in fee-simple.

In relation to barring estates tail, remainders, reversions, &c.

As to DEEDS ENROLLED, they are of three kinds, viz.

Deeds enrolled by special custom ; as in London.

Deeds enrolled at common law.

Deeds enrolled in pursuance of the stat. 27 H. 8. or bargain and sales enrolled :

Whereof hereafter, Sect. 36.

SECTION XXXV.

Concerning conveyances by matter in pais. And first, of DEEDS;

CONVEYANCES by matter in pais are of two kinds;
viz.

Conveyances without deed;

Conveyances by or with deed.

Conveyances IN PAIS without deed, are either;

Of chattels; or;

Of freeholds.

Of CHATTELS; as leases, or extents of land; and may
be either;

By grant or assignment;

By parol;

By exchange; *quere*;

Of FREEHOLD of lands by livery. Of this hereafter.

Conveyances IN PAIS; with or by deed.

Here we may consider;

The nature of deeds themselves;

Their effect or efficacy in relation to;

Acquiring } Estates.
Transferring }

Concerning the nature of deeds, they are considerable;

Simply in themselves;

And here the whole learning of deeds, viz.

Of the parties thereto; and their names.

Of the kinds of deeds, viz. indented and poll.

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Of the parts constituting deeds ; sealing and delivery,
&c.

With RELATION to the passing of estates ; and so they
are called,

Charters,

Grants,

Feoffments.

Deeds SIMPLY considered :

Their constituent parts, SEALING and DELIVERY.

The parties to them ; GRANTOR and GRANTEE, &c.
their names, &c.

Their kinds, INDENTED, and POLL ; and the EFFECTS
resulting from both or either ;

Particularly of estoppel.

Deeds considered with relation to their USE, especially in
grants, feoffments, and other conveyances.

And herein we consider,

Their kinds ;

Their several parts.

As to the kinds of deeds, they are either,

Such as have their efficacy without the adjunct of
some other ceremony ;

Such as to their EFFECTS require another ceremony to
be joined with them.

As to the former of these, they are of three kinds :

Grants ;

Releases ;

Confirmations.

As to GRANTS : there are many things that are of an
INCORPOREAL nature ; as, [advowsons, tithes, liber-
ties, commons, &c.] that,

CANNOT pass from one to another by act of the party
without deed. Yet,

4 Co. 33. b. Pass by deed without any other ceremony requisite.

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As to RELEASES, they are of several kinds, viz.

Releases, whereby the thing released is EXTINGUISHED in the possession of the releasee; as, rights, common, feignories, rents, &c. and other profits issuing out of lands by release to the tenant.

Releases whereby an estate is transferred, which is either,

By MITTER LE ESTATE, as of one joint-tenant to another.

By INCREASE or ENLARGEMENT of the estate, being made by the reversioner to the lessee in privity, with apt enlarging words.

As to CONFIRMATIONS, they are of two sorts, viz.

CORROBORATING the estate of which it is made; as, dean and chapter confirming the grant of the bishop; patron and ordinary confirming the grant of the parson; or the disseisee that of the disseisor.

ENLARGING the estate with apt words; as, in case of release.

As to the other sort of deeds that require a ceremony CONCOMITANT with them, to make them effectual, viz.

A LIVERY OF SEISIN in the case of a feoffment, though by deed;

And here comes in all the learning of livery, letters of attorney to make or receive it, &c.

ATTORNMENT requisite in cases of grants, of reversions, remainders, rents, feignories.

And here of attornments; how, by whom, and when to be made.

And the several effects thereof, viz.

To create a privity of distress, or action; as in the

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case of fines, *quid juris clamat, quem redditum reddit, per quæ servitia.*

To pass THE INTEREST, as in case of grants, singly by deed.

Thus far of the nature of deeds in reference to the acquett of lands.

But there are besides this, in relation to deeds passing lands, several parts that usually occur in deeds, and which take up large titles, viz.

The PARTIES, and therein their names, and names of purchase; as grantor, grantee, feoffor, feoffee.

The PREMISES of the deed; containing,

EFFECTUAL WORDS to pass the interest, as grant, enfeoff, &c.

The thing granted, which takes in the whole title of comprize, and nient comprize, viz.

By what names things pass:

What things are COMPRIZED within the grant, viz.

Things in GROSS.

Things PARCEL.

Things INCIDENT, APPENDANT, APPURTENANT, &c.

The HABENDUM of the deed, WHICH LIMITS THE ESTATE; and what words are apt for this.

The RESERVATION or REDDENDUM; and what shall be said a good reservation.

The COVENANTS; which are of two kinds:

Covenants PERSONAL, and their exposition.

And here of covenants; as,

What shall pass with the land, and what not;

Their exposition.

Covenants REAL, which is warranty,

An
d

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And here of that learning ; as,

What their KINDS ;

General,

Special,

Lineal,

Collateral,

What their EFFECTS :

By way of ACTION, VOUCHER, WARRANTIA
CHARTÆ.

By way of BAR, or rebutter.

The CONDITION or DEFEASANCE.

And here all the learning of conditions and limitations : and incident to this learning of deeds falls in those two great titles, viz,

MONSTRANCE DE FAITS, or where deeds are necessary to be pleaded or shewn.

EXPOSITION DE FAITS ; which is full of infinite variety, according to the texture of deeds, and their several clauses.

S E C T. XXXVI.

Of conveyances by force of statutes.

AND thus far of conveyances according to the course of the common law; and now I proceed to conveyances, according unto, or by force, or power, OF ACTS OF PARLIAMENT.

Conveyances according to, or by virtue of acts of parliament, are of two kinds, viz.

By way of BARGAIN AND SALE, according to the stat. 27 H. 8.

By way OF USE.

And this latter is either,

With transmutation of possession; as,

By feoffment or fine.

Without transmutation of possession;

By covenant to stand seised.

And this is a large field, for all the learning of uses come in here; as,

Of CONSIDERATIONS sufficient to raise it

CONTINGENT USES, &c.

How destroyed;

How revived.

By way of DEVISE.

And here all that voluminous title of devises, and the incidents thereto, may be introduced.

S E C T.

S E C T. XXXVII.

Concerning CUSTOMARY estates.

THUS far of estates at common law; we come now to customary estates, viz. tenant by VIRGE, or by copy of court-roll.

And because this is a SPECIAL kind of customary estate, and I shall not have again to do with it, I shall shortly consider these two things, viz.

The nature or kinds of estates grantable thereof.

The incidents relative thereunto.

Touching the nature of estates grantable, THE CUSTOM DIRECTS IT.

For by custom it is grantable,

In fee-simple;

In fee-tail: and here of the entailing copyholds, where it may be, and how barred.

For life or lives.

Touching the incidents relative to copyholds, they consist either in,

Modes of acquiring: or,

Manner of transferring.

Touching the transferring the interest of the copyholder, it is done,

By hereditary descent: and here of what effect or use the heir's admission is.

By surrender: which is either,

In court. Or,

Out of court, into the hands of the lord, the steward,

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or customary tenants,—when warranted by the custom.

And the effect of such surrender; where, when, and how it must be presented.

The learning concerning copyholds is grown very large, and takes in very many particulars: For instance;

Who is lord to make a grant or admittance: what a DOMINUS PRO TEMPORE, or a disseisor, may do therein,

Who is a steward to perform that office, and his power therein.

What shall be said a copyhold manor, or a copyhold court, to enable such grants.

What shall be said a forfeiture of a copyhold estate:

By waste,

By alienation;

By refusal to perform services,

Who shall be bound by such forfeiture,

Who shall take advantage of it.

What shall be a dispensation with it.

Besides which, there are very many more considerables will fall under the title of customary estates, or copyholds.

SECT.

S E C T. XXXVIII.

Of translation of property BY FORFEITURE.

I NOW come to those translations of estates which happen BY DEFAULT of the tenant in fee-simple, viz. such as are forfeitures of his estate.

And these are of several kinds :

Forfeiture BY ATTAINDER ; either,

Of TREASON—which gives the land to the king by the common law. (And this lets in all the learning touching offices, petitions, &c.) Or,

Of FELONY ; whereby it escheats to the lord ; whereof before, Sect. 33.

Forfeiture by purchase in mortmain WITHOUT LICENCE, whereby it goes to the lord.

Forfeiture BY CESSING from doing his services PER BIENNIUM. And here comes in the learning of cessions.

Forfeiture by alienation CONTRA FORMAM COLLATIONIS.

S E C T. XXXIX.

OF WRONGS OR INJURIES. *And first, of wrongs to persons.*

I COME now from the consideration of rights or JURA, to consider of wrongs or INJURIAE; wherein I shall take this order, viz.

First, I shall pursue the several natures of injuries, as they are severally applicable to those things, which are the subjects whereto the several rights aforesaid are adherent.

Secondly, because it will be a shorter and plainer way to mention the several natures of the remedies applicable to the several kinds of injuries, or wrongs, I shall mention THOSE ACTIONS that are applicable to the several injuries, together with the injuries themselves; leaving the farther explication of the manner of application of those remedies unto the third and proper head, concerning RELIEFS OR REMEDIES.

As to injuries or wrongs, they are of two kinds, viz,

Such as are of ecclesiastical conuzance,

Such as are of temporal conuzance.

Such as are of ecclesiastical conuzance are either,
Criminal, or,
Civil.

The wrongs CRIMINAL of ecclesiastical conuzance, are such as are PUBLIC scandals and offences, wherein the judge ecclesiastical proceeds, either,

At the prosecution of some person: or,

EX OFFICIO, & PRO SALUTE ANIMÆ; as,

In cases of adultery, fornication, incest, prophanation
of

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of sacred things, or times, (or places,) blasphemy, heresy, and divers others.

Wrongs CIVIL of ecclesiastical conuzance, are of these kinds, viz.

DEFAMATION in some particulars.

TITHES,—their right, subtraction, &c. As also obligations, mortuaries, pensions.

Causes of SPOILIATION in relation to benefices ecclesiastical.

Matters of MATRIMONY and DIVORCE.

WILLS or testaments, and administrations.

Those wrongs that are of TEMPORAL conuzance, are of three kinds:

Such as are of the conuzance of the admiral's court; as piracy, depredations, and wrongs ON THE HIGH SEA.

Such as are of the constable and marshal's court; as usurpation of coats of arms, matters of precedence, &c.

Such as are of the conuzance of the common law courts. This latter head is very large and extensive; but, in general, may be divided into two kinds:

Such as are criminal or public, wherein the wrongdoer is proceeded against criminally. And these are to be distributed under the titles of PLEAS OF

THE CROWN,

Such as are civil or private; wherein at the suit or prosecution of the party injured, he has reparation or right done.

Touching injuries to CIVIL rights or interests, they must be distributed according to the several natures and kinds of those rights which by those wrongs are injured. And since we have already before considered of two sorts of rights, viz. rights of persons, and rights of things, I shall begin with those wrongs that relate to the rights of PERSONS.

And since in the distribution we have made of the rights of persons,

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persons, we have observed, that the rights of persons have a double consideration, viz.

One ABSOLUTE, in reference to the person himself; and,
Another RELATIVE, with respect to the persons related to him:

We shall distinguish wrongs accordingly—

Wrongs therefore of common law conuzance, which are private or civil, are such as are done either,

By PARTICULAR persons; or,

By countenance of LEGAL proceedings.

And the former part of these wrongs, are done either,

To the rights of persons; or,

To the rights of things annexed to persons, in point of property or estate.

As to wrongs that are done to persons, or in relation to the rights of persons, they are of two kinds;

Such as relate to the person considered absolutely and IN HIMSELF;

Such as relate to him, as he stands in some kind of RELATION to another person.

As to such wrongs as relate to the person himself, they are of three kinds. Every man has a right to his own person; and a wrong done to that, is nearest to him, because a man has the greatest propriety in his own person.

And the wrongs thereunto are also of two kinds, viz.

WRONGS TO HIS BODY;

WRONGS TO HIS NAME OR REPUTATION; for I reckon this amongst those wrongs that are done to his person.

The wrongs to his BODY are of two kinds, viz.

ASSAULTS; as, beating, maiming, wounding;

Wherein the law gives a double remedy, viz.

PREVENTIONAL; by security of the peace;

REMEDIAL, by action either of

Trespass,

Affault,

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Affault,

Battery,

Wounding,

Appeal of mayhem.

IMPRISONMENT, without lawful or just cause: 2 Inst.

Wherein the law also gives him a double remedy, P. 55.

VIZ.

TO REMOVE OR AVOID the imprisonment; as by *habeas corpus* into the king's bench or common pleas, writs of mainprize, *de odio & atia, de homine replegiando*, &c.

TO RECOVER DAMAGES by way of compensation for it, by action of false imprisonment; or if the imprisonment be lawful, but the party bailable, and his bail REFUSED, in some cases a special action of the case upon the stat. 23 H. 6.

As to wrongs done to his NAME, they are of two kinds, viz.

SCANDAL by words spoken,—libels,—pictures, &c. wherein the remedy is to have compensation in damages by action on the case.

And here comes in all that large title of ACTIONS OF SLANDER, and what words are scandalous.

Under PRETENCE of a legal prosecution, but FALSE and MALICIOUS; as, for a false and malicious imposing some great crime by complaint to a justice of peace, or by preferring a bill of indictment falsely and maliciously.

The remedy the law gives, is,

Sometimes by an action of conspiracy.

Sometimes, and more ordinarily, by action UPON THE CASE.

SECT.

SECT. XL

Of wrongs to persons UNDER RELATION.

THE wrongs that are done to a person under some kind of relation, principally take in the three **OECONOMICAL** relations before mentioned; as,

Husband and wife.

Parent and child.

Master and servant.

And some of the civil; as,

Guardian and pupil.

Lord and tenant, &c.

First, for husband and wife; as where the wife is taken away from the husband, the law has provided a remedy for him by action of trespass **DE UXORE ABDUCTA**. So if she be beaten, a special action of trespass (on the case) for beating his wife, **PER QUOD CONSORTIUM AMISIT**:

As to parent and child: wrongs of this kind are either,

By taking away the child under age **OUT OF THE CUSTODY** of the parent, where the remedy is action of trespass.

By taking away, and marrying the heir within age: the remedy is, trespass or ravishment, to recover damages, and the value of the marriage.

As to master and servant:

If a servant be retained by another before his time is expired; remedy is, action **ON THE CASE**.

If a servant be beaten, whereby he is **DISABLED** to work;
the

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the remedy is, action of trespass or case, *PER QUOD SERVITIUM AMISIT* (1),

We come now to interests of civil relations, and the wrongs therein respect,

Guardian and pupil.

Lord and tenant.

Lord and villein.

As to the first of these, the guardian has an interest in the pupil in these two kinds of guardians:

Guardian in knights-service.

Guardian in socage (1).

If the ward be taken away, or taken away and married, it is a wrong to the guardian, and remediable;

By trespass.

By writ of ravishment of ward.

By writ of right of ward.

As to that of lord and tenant: If they be tenants *AT WILL*, and either by menaces, or by unlawful distresses, they are driven away from their tenancies, it is a wrong which the lord may repair himself in, by special action on the case.

So if a villein be forced from his service, or beaten or maimed so that he is disabled to perform such service, an action of trespass lies, *per quod servitium amisit*. Vide ante sect. 1. 21.

(1) Vide the case of *Postlethwaite and Parkes*, 1 Bur. 1878.

(2) But see 16 Car. I. c. 20. and 12 Car. II. c. 24. See also *Blac. Com.* 1 v. 462. 2 v. 67, 88.

SECT. XLI.

Of wrongs in relation to rights of things. And first, of things personal.

HITHERTO of wrongs as they relate to persons, either absolutely, or under relations economical or civil; I come now to such wrongs as relate to THINGS, and those are either,

To things personal,

To things real.

Wrongs relating to things PERSONAL are of these kinds, viz. according to the nature of the things:

Personal things IN POSSESSION,

Personal things IN ACTION.

As to personal things in possession, viz. goods, cattle, money, &c. the wrongs thereto are of two kinds:

An unjust taking; or a taking and detaining of them, which is an injury; and for which the party grieved has his remedy, viz. either,

To have the things themselves, if detained, by REPLEVIN.

To have reparation in point of damages by action, either of trespass VI & ARMIS; or of trover and conversion.

An unjust DETAINING, without an unjust taking.

The remedy:

The things IN SPECIE,—by replevin, if taken for damages only; or,

Trover.

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Trover and conversion for the **THING**, or if it can't be had, for damages by **DETINUE** (*m*).

And although **CHARTERS** concerning land be in the **REALTY** in respect of their relation to the land;—yet they are not in **THEMSELVES** any more than paper, or parchment, and wax; and therefore are within the aforesaid rules, in respect of taking or detaining them.

Personal things in **ACTION** are likewise of two kinds:

Such things in action as arise by **EXPRESS** contract or agreement.

Such things in action as arise by **IMPLIED** contract, or **QUASI EX CONTRACTU**.

The former kind are of two sorts:

By deed or specialty.

Without deed or specialty.

Those that are with or by **SPECIALTY** are also of two kinds, viz.

DEBTS:

And the wrong that relates to them is non-payment according to the deed.

The remedy is action of debt, to recover the debt **ITSELF**, and damages for non-payment.

(*m*) There is a mistake in the sentence to which this note is meant to apply. An action of trover does not, as I conceive, lay to recover the **THING** converted, but to recover **DAMAGES** for the conversion. On a recovery in trover, the property of the goods is changed, and legally vested in the defendant. *Stra.* 1078. On the other hand, the immediate object of the action of detinue (unless for a subsequent detainer, where the original caption was legal) is, I apprehend, the **POSSESSION** of the thing detained; for which reason, in this mode of action, it is necessary to ascertain the thing detained, in so clear and explicit a manner, that it may be specifically known and **RECOVERED**. *F. N. B.* 69. 138. But this action is now seldom, if ever, used; the preference, and that for very good reasons, having for some time been given to the action of trover.

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COVENANTS;

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COVENANTS;

The wrong herein is breach of covenant.

The remedy, action of covenant: and here comes in the learning of covenants;

What words make a covenant.

What covenants pass to the assignees, &c.

Those that are without specialty.

DEBTS:

The wrong and remedy the same as before, in cases of debts by specialty.

And hither also may be referred those things, which though they favour of the REALTY, are yet recoverable by action of debt; as rents reserved on leases for years, relief, &c.

PROMISES for a good consideration; whether they be promises that arise by law, or such as are collateral.

Remedy in all such cases, is to recover damages by action ON THE CASE;

And here comes in WARRANTY of chattels UPON SALE.

Such things in action as arise by an IMPLIED contract are many: for instance;

In contracts for things, it is generally intended, THAT NONE SELL ANY THING THAT HE KNOWS NOT TO BE HIS OWN; if he does, an action on the case lies in nature of DISCEIT.

In contracts FOR VICTUALS, it is implied, THAT THEY ARE NOT UNWHOLESOME; if they be, an action on the case lies.

In persons that undertake a COMMON TRUST, it is implied, THAT THEY PERFORM IT; otherwise an action on the case lies.

As for instance;

In the case of,

A common host, that he secure goods in his inn.

A common

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- A common carrier or bargeman, that he secure the goods he carries.
 - A common farrier, that he perform his work WELL, without hurting the horse.
 - A common taylor, that he does his work WELL; and so of other tradesmen, &c.
-

S E C T. XLII.

Touching wrongs to things REAL,—without dispossessing the party;—and their remedies.

I COME now to those wrongs or injuries which are done to things REAL, and the rights of them.

And these may be divided in these two kinds, viz.

Such as are WITHOUT a removing the owner or proprietor out of possession :

Such as are WITH a remover of him out of his possession,

Those which are without a remover out of possession, are of several kinds : I shall reduce them to these following, viz.

TRESPASSES by breaking any man's ground, hedges, &c. by the party trespassor himself, or by his command, or by his cattle, &c.

Remedy, to repair the party in damages, by action of trespass, QUARE CLAUSUM FREGIT.

NUSANCES, or annoyances, either

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To interests in things corporeal; as houses, &c. by stopping lights, erecting lime-kilns, or things annoying another's dwelling; or withdrawing water from a mill, &c.

Or, to things incorporeal; as,

To CHEMINS or ways, by obstructing them, &c.

To MARKETS, by erecting another market too near them.

So of FERRIES, by erecting another too near: And infinite more instances may be given, the title of nuisances being very large.

The remedies in all these cases are either,

Without suit, TO ABATE, OR TO REMOVE THEM,—if done to inheritances corporeal, or *chemins*.

By suit; as,

Quod permittat, assize of nuisance, to remove the thing, and recover damages.—Or,

Action on the case to recover damages. Vide Sect. 46 & 47.

DISTURBANCES: and this principally concerns such real things as are incorporeal; for instance;

Disturbance to present to a church presentable: and this concerns advowsons, and right of patronage,

And the remedies relating thereunto are,

Quare impedit;

Affize de darrein presentment;

Quare incumbravit;

Ne admittas;

Breve episcopo ad admittendum clericum;

And this is a vast and a curious piece of learning.

Disturbance of a person to enjoy his FRANCHISES; as, Disturbing such as come to my market, or to my leet.

Forcing them to come to another court.

Not

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Not permitting a person to hold his court, or take his toll,

And many more of the like.

The common remedy herein is by action ON THE CASE.

Disturbance of COMMONERS to enjoy their common ;
surcharging the common by one that has common ;
or by putting in cattle by one that has not common ;
by erecting a warren to the prejudice of the commoners.

Here the remedy in some cases may be by admeasurement, assize, *quod permittat* :

But in most, and indeed in all cases of this nature, it is usual by action ON THE CASE.

Disturbances of WAYS.

The like wrongs,

And the like remedy.

The fourth sort of injuries are, SUBTRACTIONS of customs, duties, or services real ; as,

Suit to court ;

Suit to mill ;

Homage ;

Fealty ;

Rents, &c.

The remedies here are various.

For, first, if the services are accompanied with A TENURE, the ordinary remedy is either,

Without suit,—BY DISTRESS.

And here of distresses, avowries, &c.

With suit ; and then,

If they are rents reserved on leases for years, the remedy is action OF DEBT :

If they are rents of freehold, remedies are by assize in case of seisin and disseisin,

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If

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If those services are WITHOUT TENURE, as suit to mill, by custom, &c. the remedies are SECTA AD MOLENDINUM, action on the case.

The fifth sort of injuries is WASTE, or destruction.

And this injury is of two kinds, according to these relations, viz.

In relation between the owner of the soil, and he that has a profit appendre out of it; as, estovers, pawnage, &c.

If the owner of the soil destroys the wood, the remedy lies by ASSIZE.

Action on the CASE to recover damages.

In relation between the particular tenant and he that has the reversion or remainder of inheritance; as waste in houses, woods, lands, &c. is a disinherison to the REVERSIONER, who has remedy either,

PREVENTIVE, by estrepement, prohibiting waste; which also lies against a tenant, where the land is in suit. Or,

REMEDIAL, by action of waste;

In the TENET;

In the TENUIT.

And here comes in a great flood of learning:

Supra, What shall be said waste:

SECT. 31. When, and against whom it lies, &c.

And although under this title of wrongs, WITHOUT REMOVAL OF POSSESSION, I have brought in remedies by assize, &c. which always supposes a dispossession, yet really it is no dispossession in those cases before instanced, because they concern things INCORPOREAL; wherein, though the party may admit himself disseised, it is but a disseisin AT ELECTION, and rather made a disseisin by his bringing an assize, which the wrong-doer shall not dispute, than truly so.

S E C T. XLMI.

Concerning wrongs which carry with them an amotion of possession.

THE wrongs which carry with them an amotion of possession are of two kinds, and concern,

The rights of chattels;

The rights of freeholds.

As to the rights of chattels, whereof the party is dispossessed by a wrong-doer, they are these, viz.

LEASES FOR YEARS.

The remedy is by EJECTIONE FIRMÆ; or if by the reversioner, QUARE EJECIT INFRA TERMINUM.

In both which at this day, he recovers damages, and the possession of his term.

WARDSHIPS AND HOLDING OVER, for single or double value.

The remedy is, *quare intrusit maritagio non satisfacto* —*ejectione custodie*; and against a stranger, a writ of right of ward.

TENANTS by stat. merchant, stat. staple, and *elegit*, though they have but chattels, yet the statute gives them remedy for their possession by affize.

I come to the rights of freeholds, and the wrongs done to them, together with an amotion of the possession: and those rights are of two kinds, viz.

Some only compatible to them that claim not only a freehold, but an INHERITANCE;

Some

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Some that are common to any that have a freehold

ONLY :

And accordingly, their remedies will be severally diversified.

These wrongs are of several kinds, viz.

Abatement ;

Intrusion ;

Disseisin ;

Usurpation ;

Discontinuance ;

Deforcement.

ABATEMENT is where one enters **AFTER** the death of the ancestor, **BEFORE** the heir enters.

The remedy is according to the nature of the descent from his ancestor,

By affize of **MORTDANCESTOR** ;

Writs of **AILE**, **BESAILE**, **COSINAGE**.

INTRUSION is an entering or continuing in possession after an estate **FOR LIFE** determined.

The remedy : he in the reversion or remainder may enter ; or if his entry be taken away, has his writ of **INTRUSION**.

DISSEISIN is a large title, and is an unlawful **ENTRY AND OUSTER** of him that has an **ACTUAL** seisin and freehold.

And it is either,

With force : in which case the party disseised has his remedy, either,

By writ of **FORCIBLE ENTRY** upon the stat. 8 H. 6. to recover the possession and damages.

By affize of **NOVEL DISSEISIN** to recover his possession, and damages ; and the party to be fined and imprisoned for his force.

By

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By writ of ENTRY in nature of an affize, to recover his seisin and damages.

Without force: and for this he has remedy by affize, or writ of entry, ut supra,

Now both these disseisins are either of

Things incorporeal, or

Things corporeal.

Of disseisins INCORPOREAL: This is not always a disseisin at the election of the freeholder.

And disseisins of inheritances INCORPOREAL are various, according to the various kinds of incorporeal inheritances; as,

Commons;

Profits appendre in another's soil;

Offices;

Tithes;

Rents by rescue;

Replevin;

Enclosure;

Denial.

Disseisin of corporeal inheritances are of two kinds:

With an ACTUAL ouster, as is requisite between

Jointenants,

Parceners,

Tenants in common.

Without an actual ouster, even by the disseisee's waving of possession upon an entry made.

And all these kinds of disseisins are done either to the party himself, or to his predecessor or ancestor.

And the remedy is,

By writ of entry SUR DISSEISIN.

And these writs of entry SUR DISSEISIN are either,

In

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In nature of an assize against the first disseisor ; or in the degrees ; as in the PER, or PER ET CUI, against the feoffee of the disseisor or his feoffee. Or,

They are in the POST ; when the degrees are spent, or when the tenant comes in under the disseisor in the POST ;

As the lord BY ESCHEAT, &c.

And this learning of disseisins, of assizes, and of entry sur disseisin, are large and comprehensive titles, and of great variety and extent.

USURPATION : this title refers only to advowsons ; where one that has no right to present, presents to a church, and his clerk is admitted and instituted, and continues in by six months.

The remedy is by WRIT OF RIGHT OF ADVOWSON for the patron in fee-simple.

And this also takes in all the learning of advowsons, and the provisions made by the stat. West. 2. to save the right of POSSESSORY actions against usurpation ;

Where it is upon the predecessor :

Where it is upon the ancestor IN TAIL :

Where upon tenant for life, guardian in chivalry, &c.

DISCONTINUANCE : this is where he that ALIENS has not the FULL right, yet it puts the party injured thereby to his REAL action ; as in these instances, viz.

Co. Lit. 326 b. When the alienation is by tenant in tail, the remedy is, for the heir in tail, by formedon IN DESCENDER ; for the reversioner, by formedon IN RE-

VERTER ;

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VERTER; and for the remainder man, by formedon IN REMAINDER.

When the alienation was by the husband seized in right of the wife, at common law the wife was driven to her CUI IN VITA; in or out of the degrees, as the case fell out.

But now she may enter, UNLESS A DESCENT BE CAST, after her husband's death, by the statute 11 H. 7.

When it was by a bishop, &c. aliening without the assent of the dean and chapter at common law, his successor was driven to his writ of entry SINE ASSENSU CAPITULI. But this is remedied by stat. 1 & 13 Eliz.

The learning of discontinuances is also very curious; as,

Who may discontinue; who not.

What shall be a discontinuance, and what not.

And as the learning thereof is ample, so is that of the remedies thereof, by FORMEDON, &c. DEFORCEMENT: and this is a larger, and a more comprehensive expression than any of the former; for a disseisor, abator, intruder, discontinuer, usurper, and those that claim under them by feoffment or alienation, are all deforceors. But the proper application of the word is to such a person, who, though he has not a just right, has yet recovered against, or BARRED HIM THAT HAS THE TRUE RIGHT; either,

By DEFAULT. And then the remedy for the party so deforced is,

If he had only a particular interest, by PER QUOD EI DEFORCEAT.

If

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If he were issue in tail of him that so lost, by
FORMEDON.

If tenant in fee-simple, or his heir, by WRIT
OF RIGHT.

Or in a real action of an inferior nature ; as
writ of entry, &c. and then,

Of the issue in tail of him that so lost,
or is barred. The remedy is, by forme-
don IN DESCENDER.

Of the tenant in fee-simple that so lost, or
is barred. The remedy is, by writ of
RIGHT (n).

(n) Since the difuse of real actions the proceeding by EJECT-
MENT is become the common mode of trying titles.

SECT.

S E C T. XLIV.

Of wrongs that have THE COUNTENANCE of legal proceedings of courts.

HITHERTO I have proceeded in examining wrongs done by parties themselves : I now come to consider of wrongs done BY COURTS, or THEIR OFFICERS, in relation to legal proceedings.

And they are of two kinds, viz.

When the court proceeds in a cause whereof they have no jurisdiction.

When they proceed in causes whereof they have jurisdiction, but proceed ERRONEOUSLY.

The former of these is a wrong, and the party has his remedy or relief therein ;

By NOT submitting to the sentence or judgment, and bringing his action against them that EXECUTE it :

By PROHIBITION from a SUPERIOR court ; as when an ecclesiastical court proceeds in a cause of temporal conuzance ; or an inferior court, that has a LIMITED jurisdiction, holds plea of a thing done OUT of its jurisdiction.

The latter is when they proceed erroneously, or by committing some mistake in a matter within their jurisdiction.

This I call a wrong ; not that the party that supposes himself injured has any remedy against THE COURT,

or

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or THE JUDGE that thus proceeds; for if men should suffer barely for error in judgment, when there is no corruption, no person would be judge in any case. But I call it a wrong, because, in truth, THE PARTY HAS A RIGHT TO BE RELIEVED against such a judgment: and,

In causes ecclesiastical or maritime, the law has provided a relief against an erroneous judgment,
BY APPEAL to other judges.

In causes of common law conuizance, errors or mistakes in judgment are REVERSED.

In courts NOT of record, as county courts, and courts baron,

By writ of FALSE JUDGMENT.

In courts of record, wherein error may happen divers ways, viz.

By error of the jury in giving a false verdict:

The remedy is by ATTAINT (a).

By error or disceit; if the sheriff returns a party as summoned when he was not, whereby judgment is against him by default:

The remedy is, by WRIT OF DISCEIT.

By error of the court. And then

The remedy is,

Writ of error in a SUPERIOR court,

AUDITA QUERELA.

And here may come in the learning of writs of error, and *audita querela*.

(a) The practice of setting aside verdicts UPON MOTION, and granting NEW TRIALS, has long superseded the remedy by "ATTAINT."

S E C T. XLV.

Concerning REMEDIES, and the method of obtaining them.

IN the former Sections I have considered of the various kinds of wrongs or injuries, and under those distributions have mentioned their ordinary remedies, and thereby have much contracted this title; wherein I shall only give some GENERAL RULES relating to the manner of the application of those remedies; leaving every particular remedial writ, together with the process belonging to it, to be considered and digested under their several titles in the former Sections.

Remedies for wrongs are according to the nature of those wrongs, viz.

Ecclesiastical;

Civil,

Ecclesiastical remedies are such as are applicable to wrongs of ecclesiastical cognizance, and take in or include these two generals, viz.

The courts or places where the said remedies are to be had;

The process preceding judgment and execution relating thereto.

Civil or temporal remedies are such as concern either,

Maritime injuries;

Military injuries;

Civil or common law injuries,

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In reliefs or remedies for maritime injuries, are considerable,

The court of relief; the ADMIRAL COURT.

The process preceding sentence, &c.

In remedies for military affairs, or matters of arms and honours,

The court is the court of honour, or military court,

The process, sentence, and judgment.

Now of little use.

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And in cases of CATTLE DOING DAMAGE upon my
ground, I may distrain upon my ground damage
done. And so I may distrain cattle that are sold for
my use.

SECT. XI.

In reference to my own possession and maintenance, I may distrain
Remedies at common law. And first, of those without suit.
Where I have a right or title unto lands, and my entry
not taken away, I may distrain.

THE law in many cases provides a remedy WITHOUT SUIT,
which in general is either,

- By act of the party;
- By act in law.

Remedies allowed by the party's own ACT, are in re-
ference,

- To things personal;
- To things real.

In reference to things personal:
If another does wrongfully take or detain my goods, my
wife, my child, or my servant, I may lawfully RE-
TAKE them again, if I can, so I do it not riotously.
So I may defend myself, or them, by force, if assaulted.

In reference to things real:
In these and some other cases, the law allows a man a
remedy without being driven to it, viz.

In cases of NUISANCE done to my freehold, I may RE-
MOVE them, if I can, without riot; as,

- To remove an obstruction out of my way.
- Or the over-hanging of another man's house over mine.
- Or the obstruction of water running to my mill.

In cases of RENTS, I may distrain the goods or cattle that
are *levant et couchant* upon the tenement charged
therewith.

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And so in cases of CATTLE DOING DAMAGE upon my ground, I may distrain UPON MY GROUND. *damage feasant*. And so I may distrain cattle that are sold for my toll.

In reference to LANDS, I may distrain, and maintain my own possession against any person that would eject or disseise me.

Where I have a right or title unto lands, and my entry not taken away, I may gain the possession by my entry. And this necessarily draws into examination these two things, viz.

TITLES of entry; which are either by breach of a condition IN FACT, or in LAW annexed to an estate that I have parted with, or my ancestor.

And here comes in, OF CONDITIONS; what are good, and whom not; when and to whom it gives an entry; and how destroyed or suspended.

RIGHTS of entry; and this lets in all those considerations that concern the titles of entry congeable,—of descents that toll entry, or continual claim,—of avoiding descents by infancy, by stat. 34 H. 8.

But regularly,

In personal things IN ACTION, as for debts, or covenants, or promises; or,

As to RIGHTS of real things, where the entry is by law taken away,—the party cannot be his own judge, but must have recourse to the courts of common justice, except in the cases following, viz.

By act IN LAW, in some cases without suit, the party shall have remedy, where by his own act he cannot;

In things personal; as if the debtor make the debtor executor, HE may pay himself.

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In things real; as where a man's entry is taken away; as by descent, or by discontinuance; yet if he come to the possession without felly or covin, he shall be REMITTED.

And here all the curious learning of remitters comes in.

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SECT.

S E C T. XLVII.

Concerning remedies at common law BY SUIT.

HITHERTO concerning wrongs and injuries in relation to things both real and personal, and remedies for the same without suit; I now come to consider of remedies BY SUIT, and the means or method of their application.

Remedies by suit seem to be of two kinds;

Such as the parties provide for themselves by mutual consent:

Such remedies as the law provides for them.

Remedies that parties provide for themselves are of two kinds;

By their own immediate accord:

By transferring the decision of it to others.

The former of these, viz. the IMMEDIATE CONSENT OF THE PARTIES, is that which in law is called AN ACCORD; which, WITH SATISFACTION ACCORDINGLY MADE, is in some cases of personal injuries a bar to any other remedy.

And this lets in the learning of accords and concords; what are good, and what not; where they are a bar, and where not.

The latter of those, viz. the transferring the decision TO OTHERS; which,

If to two, or more, is called an ARBITRAMENT:

If to one, an UMPIRAGE.

And here the large learning of arbitraments and awards; what a good submission; what a good award, or not; what

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what remedy upon it; when and where it is a bar in personal actions, &c.

Secondly, such remedies as the law provides are also of two kinds, viz.

Such remedies as the law provides without suit; whereof before.

Such remedies as the law provides in the courts of justice, SETTLED BY LAW, and according to those constitutions touching actions and suits, that the law has provided and instituted.

And this takes in these considerations, viz.

The courts of judicatories, established by law, for recovering of rights, and redressing of wrongs.

The remedies themselves BY CERTAIN WRITS instituted by law, and applicable to those several wrongs.

The prosecution or pursuit of those remedies in the said courts.

The first of these concerns the large learning of the jurisdiction of courts. And forasmuch as there are several entire tracts written thereon, and I have before touched upon them, I shall here forbear to say any thing further herein; only that that learning may with reason enough be transferred hither, at least some particulars thereof.

The second, touching the natures and applications of those remedies, I have in the former Sections, under every several kind of wrong or injury, mentioned the respective remedy, and therefore shall not again repeat it here.

The third, which is the prosecution, or pursuit, of those remedies, is the business of this division.

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But before I enter upon that matter, I shall premise these two things, viz.

First, that the best way to meet with all the titles of the law in this business, will be to pursue the same in the order and method of the proceedings themselves, without any other distribution.

Secondly, that there are some things wherein the pursuit of a real suit and personal do differ; as in the PROCESS, the JUDGMENT, and the EXECUTION. In most other things they agree; or, at least, the pursuit of a real action contains all the general learning of a personal action, and much more.

Where therefore there is a signal difference, I shall observe it by the way, without running through the whole procedure of a real and personal action distinctly; and shall only here observe, that the general parts of a suit are these:

The process.

The pleading.

The issue.

The trial.

The judgment.

The execution.

The appeal.

SECT.

SECT. XLVIII.

Of procefs and appearing.

FIRST, where a wrong is done, or a right detained, the party injured is to make his application or suit for that remedy which the law ordains; and in order thereto, to take out such writ or procefs as the law, on the circumstance of his case, requires.

The common, usual, ordinary procefs are as follow :

In personal actions,

Summons, attachment, distrefs, *capias* (p), *alias*, *pluries* & *exigent*, and in some it begins with attachment.

In real actions,

It is summons, *grand cape*, and judgment; or AFTER appearance, *petit cape*, and judgment.

In mixed actions,

In affizes,—attachment; and upon default, the inquest taken by default.

In waste,—attachment and grand distrefs, and an enquiry of the waste, &c.

Every procefs gives the defendant a day in court; and this lets in these several things, viz.

(p) The *CAPIAS*, generally speaking, is peculiar to the court of common pleas; the ordinary procefs in personal actions, in the court of king's bench, being the bill of Middlesex, and the *latitat*, *alias latitat*, &c. The ordinary procefs in the exchequer-office of pleas are, *quod minus ad respondendum*, *subpoena ad respondendum*, *venire facias ad respondendum*.

JOUR

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JOUR IN COURT, and the variety of it.

And incident to this, is,

Adjournment; and,

Discontinuance.

And at that day; or *jour in court*; the defendant or tenant
either appears, or not appears.

Here of appearance, and its diversity;

By guardian, or *prochein amy*;

By attorney;

In person.

If there be not an appearance,

Either a DEFAULT is made:

And here of the process upon default,

In personal actions;

In real actions.

Or there is AN EXCUSE of appearance,

And therein *safer default*;

By protection;

By effoin prayed.

And here all the learning of effoins;

Their nature,

Mirror,

c. 5. § 1. Their diversity; as,

Common effoins,

Service le roy, &c.

On the other side, as to the plaintiff.

The plaintiff either appears; or,

Makes default, and thereupon a non-prosecution.

And here of the nature and variety of

Nonuits;

Retraxit, &c.

S E C T. XLIX.

Of PLEADING.

SECONDLY, I come to pleading.

If both parties appear, the plaintiff declares of counts.

And here of,

Counts.

Declarations.

And the defendant or tenant's part is after imparlance to PLEAD.

And such plea is either,

Dilatory; or,

To the matter or right of the complaint.

Dilatory pleas are of several sorts:

To the JURISDICTION of the court;

From the place where the suit arises;

From the thing in controversy, as, ancient demesne.

Or,

To the impotency, or NON ABILITY of the plaintiff, which is very various; as,

Alien } *Any.*

{ Enemy.

Outlawry { In personal actions.
 { For felony.

Excommunication.

And formerly villenage. And,

Professed.

In ABATEMENT;

And this either,

Of the count.

Of

[124] THE ANALYSIS OF THE LAW.

Of the writ.

VIEW DEMANDED.

And this is a large title.

AID PRAYED;

Of the king:

And here of *rege inconsulto, procedendo*.

Of a common person.

And here of **AID**.

The different kinds of aid; as,

Of the reversioner or remainder-man.

Of the patron and ordinary.

VOUCHER: which is a very large title.

And here of voucher;

In what action;

Of what person.

Counter-plea of voucher.

Process against vouchee.

Pleading of vouchee.

Recovery in value.

AGE PRIER:

For minority of the demandant.

For nonage of the tenant.

And here of prier in aid of vouchee, &c.

And all the learning of age.

And herein comes also, what and when pleas dilatory are peremptory,

After demurrer;

After trial:

And of pleas in abatement **AFTER THE LAST CONTINUANCE.**

Pleas that go to the right or **MERIT** of the complaint, are of two sorts;

First, pleas **TO THE ACTION**, which **DENIES** the **SUBSTANCE** of the complaint:

And

THE ANALYSIS OF THE LAW. [125]

And commonly make either,

A GENERAL issue; as,

In trespass,—not guilty;

In debt upon a contract,—*nil debet*.

In *assumpsit*,—*non assumpsit*.

In assize,—*nul tort, nul disseisin*.

In dower,—*nunquē de seize de dower*.

In a writ of right,—that the tenant has more right to hold, than the demandant has to demand.

Or a COMMON issue; as,

In debt on bond, or action of covenant,—*non est factum*.

In an assize of *mortdancestor*, *aiel*, *besaiel*, &c. that the ancestor was never seised.

Secondly, pleas IN BAR: these are very various and different, according to the several kinds of the tenants or defendants case.

And lets in all the learning of bars, &c. as,

Bars are either such as are,

PROPER.

COMMON.

Pleas in bar are therefore considerable,

In their nature or matter.

In their qualities or manner of pleading.

Bars according to the nature of the action, and case of the parties, are very various and different; and therefore here all the learning of such bars comes in, yet somewhat concerning them follows.

Proper bars are,

Such as are applicable only to REAL or MIXED actions;

as,

Fine;

Forfeiture;

Release

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Release of right;

Warranty, &c.

Of the plaintiff;

Or his ancestor.

Such as are proper to **PERSONAL actions only**; as,

Accord with satisfaction;

Arbitrament;

Performance,

Of the condition.

Of the bond.

Such bars as are common to **BOTH**, yet diversified oftentimes with such diversifications as are applicable to the nature of the action; as,

RELEASE of action.

LIMITATION of time by act of parliament elapsed.

ESTOPPELS;

And here of the several kinds of estoppels:

By matter of **RECORD**.

By matter **IN PAIS**; as,

Deeds indented or poll.

And here of the whole learning of estoppels;

For note, estoppels are not only the matter of bars, but of replications, rejoinders, and all other pleadings.

Concerning bars as to their qualities or manner of pleading, the same common rules of pleading for the most part concerns all kinds of pleading.

And therefore I shall here shortly insert them once for all, viz.

That the plea be **SINGLE**, and not double.

And here of double pleas.

That it have convenient **CERTAINTY** of time, place, and persons.

That it **ANSWER** the demandant's or plaintiff's count or plaint.

That

THE ANALYSIS OF THE LAW. [127]

That it be so pleaded, that it may be TRIED.

When the defendant has pleaded, what next follows is, the plaintiff or demandant's answer to the defendant's plea; and this is called a REPLICATION.

And here of the general rules, &c. of replications, viz.

That it be,

CERTAIN;

SINGLE:

ANSWERING THE BAR, &c.

And this replication either,

DENIES or TRAVERSEs the bar or plea of the defendant; and THEN AN ISSUE IS TENDERED, which regularly must be joined in by the other party, and then the parties are at issue.

And here all the learning of TRAVERSE; what is traversable, or not; how it must be made, either simply without an inducement, or with an inducement; and concluding ABSQUE HOC to the matter alledged by the defendant.

Or CONFESSES AND AVOIDS.

And here all the learning of confessing and avoiding; and then there is no issue offered by the replication: but possibly the pleadings run on to surrejoinder, rejoinder, rebutter, or surrebutter.

For if the plaintiff replies so as no issue be offered, this gives occasion to the defendant to REJOIN.

And here of rejoinder, and how he must MAINTAIN his bar, and NOT DEPART from his plea.

And here of DEPARTURE IN PLEADING.

S E C T.

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SECT. L.

Of ISSUES.

THUS far of pleading. Now by this time either by the plea, replication, rejoinder, &c. the parties are descended to AN ISSUE, viz. to something AFFIRMED by the one party AND DENIED by the other; which affirmation and denial is called AN ISSUE; for now the parties have no more to do, unless a matter happen to EMERGE AFTER issue joined, and the last continuance.

This, if it be pleaded, is called a plea PUIS LE DARREIN CONTINUANCE.

So that their business being at issue, they have no more to do but to expect the trial and determination of that issue.

Now issues are of these kinds, viz.

An issue joined upon a matter of LAW, which is to be determined by THE COURT.

And this issue is called a DEMURRER,

An issue OF FACT, which is of two kinds;

An issue joined touching a matter of RECORD, on *nul tiel* record pleaded, &c,

An issue joined touching a matter IN PAIS; as,

Whether such a deed were made.

Whether such a scoffment were executed, &c.

SECT.

SECT. LI.

Of TRIALS.

AND now issue being joined between the parties, *vide* Co. 9. they have no more to do but to expect the trial *fol. 30.* of that issue; and for that end they have DAYS OF CONTINUANCE given.

Here of continuances, &c.

Trials are of several kinds, according to the nature of issues, and the several appointments and directions of the law touching the same, viz.

Trial BY RECORD; as,

When issue is joined, whether there be any such record or no.

Trial BY INSPECTION; as,

Upon error to reverse a fine levied by an infant; or in *audita querela* to avoid a recognizance acknowledged during his minority.

Trial BY PROOFS; as,

Where issue in dower is, whether the husband be living or not.

Trial by EXAMINATION; as,

Where an action of debt upon account is brought for things not lying in account.

Trial by CERTIFICATE:

Of the constable and marshal, whether the party be in service.

Of the bishop, by mandate from the secular court, as in case of general bastardy.

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So of issues upon the right of marriage between the parties to the suit.

So of plenarty by institution into churches.

Trial BY BATTLE:

In appeals.

In a writ of right.

Trial BY JURY (q).

And this takes in a large field of learning.

Trials by jury are,

Extraordinary.

Ordinary.

Extraordinary: in writ of right,

In attaint. *Quare Appeals.*

Ordinary: by TWELVE MEN.

Wherein consider,

The PROCESS to bring in the jury,

In C. B.—by *venire facias & habeas corpus.*

In B. R.—by *venire fac & distringas juratorum.*

The TALES for want of a full jury appearing.

CHALLENGES of all sorts;

To the array.

To the polls.

The OATH of the jury.

The EVIDENCE to be given to the jury:

What allowable to be given;

And when.

Co. Lit.

p. 227. b. **VERDICT of the jurors:**

General verdict.

Special verdict.

What DEFAULTS or miscarriages impeach the verdict.

The POSTEA, or return of the verdict by the judges of nisi prius.

(q) To the several kinds of trial enumerated by sir Matthew Hale may be added "trial by wager of law."

S E C T.

S E C T. LII.

Of JUDGMENT.

THE fifth act in this business of prosecution or suit, is judgment.

And here the whole learning of judgment comes in, viz.

What shall be sufficient TO STAY judgment.

And herein,

Of arresting judgments.

Of reversing judgments.

Upon what it is given; which for the most part is upon these premisses or precedents.

Upon DEFAULT, after default; as in real actions after the grand distress in,

Waste;

Quare impedit.

Upon CONFESSION,

Nihil dicit;

Non sum informatus.

Upon DEMURRER.

Upon TRIAL of the issue, according to the various methods of trial above mentioned.

The several kinds of judgments.

In suits real.

In suits personal.

INTERLOCUTORY, and not final; as,

Awards upon the writ affirmed, or other dilatory pleas, where the judgment in many cases only is,

Respondet ouster,

[K 2]

FINAL

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FINAL, but NOT compleat:

And that either,

Incompleat IN PART, but compleat in the residue;

as,

Where the judgment is given for the thing demanded, but the damages not yet inquired of.

Incompleat in THE WHOLE; as,

Where a judgment is given for the party to recover his damages, where the damages are the principal; wherein,

The compleat judgment is not given till the writ of inquiry returned.

FINAL and compleat, with respect to the action upon which it is given,

Final, not only as to the action upon which it is given, but to all other actions touching THAT thing; as,

Judgment final, in a writ of right after the issue joined, &c.

The forms of entry of judgments.

SECT.

S E C T. LIII.

Of EXECUTION.

THE sixth act in this business of suit, is execution; which

Is a great field of learning.

Executions seem to be of two kinds:

Within the year.

After the year.

The former of these is also of two kinds:

In reference to LANDS recovered.

In reference to DEBTS or DAMAGES recovered.

First, in relation to lands recovered, two things are considerable:

The writ or mandate of execution.

The execution of the said writ.

Touching the former;

The writ of mandate itself is of two kinds, in relation to the ESTATE recovered:

If a FREEHOLD,—*hab' fac' seisinam.*

If a CHATTEL,—*hab' fac' possessionem.*

I do not here meddle with the executions of other kinds of writs, as *quod permittat, replevin, &c.* because they may come in in the former section, where the writs themselves are mentioned; and they are various.

Touching the latter;

In the execution of the writ is considerable:

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The officer that is to make it.

And here of the office of sheriff ;

The manner of his making ;

His power ;

His duty in making returns, &c.

The manner of doing it.

And here of the POSSE COMITATUS.

Sed vide ante, of Sheriffs, Sec. 12.

In reference to debts or damages recovered, there are also considerable ;

The nature of the process :

The manner of its execution.

The PROCESS itself is of the following kinds :

And so are the methods or manner of the execution.

(N. B. They are herein joined together.)

The BODY only,—by *capias ad satisfaciend'*.

And here of *capias* :

Where it lies ;

How executed ;

When with, and when without, breaking open doors.

What kind of execution it is ;

Whether without satisfaction.

And here of NON OMITTAS :

As also of escapes.

GOODS only,—by *fiari facias*.

And here of that learning :

How, upon what, and by whom, it is executed.

And whether a return be necessary.

PROFITS OF LANDS only,—by *levari facias*.

And here of that :

What profits shall be levied ;

And whereupon.

PART

THE ANALYSIS OF THE LAW. [135]

PART of the LANDS, and ALL the goods,—by
elegit.

Here of *elegit*.

Where it lies ;

What lands extendible ;

How the extent shall be made ;

How returned ;

And where a re-extent.

BODY, LANDS, AND GOODS,—by extent upon a
stat. merchant, or stat. staple, or a recognizance
in nature of a stat. staple.

And here of these executions.

What they are ;

The manner of executing the same, &c.

Touching executions after the year past ;

When the proceeding is,

To revive the judgment. And,

Obtain execution thereof ;

By SCIRE FACIAS.

And here all the learning of *scire facias*.

S E C T. LIV.

Of redress of injuries, BY ERROR, &c.

LASTLY, I come to remedies that persons have, to be relieved against the proceedings aforesaid, in case they have just cause so to be.

And they are these, viz.

By WRIT OF ERROR; to remove the record into a superior court, to examine the errors, in case the inferior court has erred in point of proceeding, judgment, or execution awarded.

And here comes in that great title Error, with its adjuncts and appendixes, viz.

Where it lies;

When it lies.

In what court.

When 'tis a *superfedeas*, &c.

What assignable for error.

The process to bring in the party that recovered.

The judgment therein, both,

When the former is affirmed; and,

When it is REVERSED.

Execution of judgment upon the affirmation or reversal:

And here of EXECUTIONS in error.

By writ of ATTAINT, where the jurors give a FALSE verdict.

And here all the learning of attaints.

By

THE ANALYSIS OF THE LAW. [137]

By writ of DISCEIT, where the judgment is by default, and the party never duly summoned.

Where the party has lost by DEFAULT in a REAL action, yet has good right, when yet by reason of his default, he did not shew it, viz.

By writ of right for him that lost by default, or his heir, having a FEE-SIMPLE.

By writ of *quod ei desorceat*, if he had only an estate for LIFE, or in TAIL.

By *formedon in descender, reverter, remainder*.
Vide ante.

And here at large the learning of FAUXIFIER DE RECOVERY.

Where the party is put out BY EXECUTION, wherein he had no day to plead or answer, as in executions by *capias, elegit, statute merchant*, &c.

By AUDITA QUERELA.

And here of the whole learning of AUDITA QUERELA.

And thus far of the partitions of the titles of the laws of England, and the Analysis thereof, in relation to rights, &c. of a civil nature.

As to pleas of the crown, and matters criminal, that should here ensue, they are already drawn up, or perfected by me, in a short tract, OF PLEAS OF THE CROWN, which I shall add to this in due time.

is not, and the party never fully commenced. By writ of mandamus, where the judgment is by the

Where the party has lost by default in a real action, yet has good right, when yet by reason of his default he did not know it, viz.

by writ of right for him that lost by default.

1. The first step is to identify the problem.

as who had not to say, "I am not a Jew."

of life, or in fact.

Administrative and financial

1914

And now at large the learning of a language is

RECOVERED.

There is but one way to get out of the...

...

as is evident from the photograph.

274 JAN 2 1934

1915 1372

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

For the purpose of the present investigation, the following data were obtained from the above-mentioned sources:

and one to each set of pharyngeal teeth to the edge

and the English people in relation to

1917

1912

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